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ABSTRACT

The Federal Government and institutions of higher learning have become interdependent elements of the research structure. Colleges and universities cannot adequately support a high level of research activity with their own limited funds, and the government must rely on the obvious wealth of expertise on campus for the conduct of research required for national goals. Congress requires detailed accountability for Federal funds and, over time, a complex system has been developed by the government to provide it. This guide has been compiled to provide individuals dealing with funding agencies the background required to understand the nature of the relationship created and the consequences for the institutions. Sections cover: (1) characteristics and procedures of the research contracts with the Federal Government; (2) analysis of approximately 100 contract clauses developed for use in research contracts with the Federal Government; (3) background material on the development of the cost principles; (4) the policies and procedures of 43 private foundations and Volunteer Health Agencies; (5) three specimen agreements; (6) a large number of specimen contract clauses covering a broad range of topics; and (7) a glossary and alphabetical index. (Author/KE)

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A Guide for Colleges and Universities

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Committee on Governmental Relations
National Association of College and University Business Offices

2

Government Contracts and Grants for Research

A Guide for Colleges and Universities

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Director of Research Administration
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1975

INTRODUCTION

No one involved in the operation of a college or university in the United States can be unaware of the magnitude of federal involvement in the conduct of scientific research on campus. The history of the Federal Government's interest in the pursuit of knowledge, and therefore research, is a long one and includes such notable actions as the sponsorship of the Lewis and Clark Expedition in 1803 and a contract with the Franklin Institute of Philadelphia in 1830 for a study of boiler explosions. The Congress apparently did not become directly involved in funding research until 1842 when $20,000 was authorized as a grant to Samuel F.B. Morse for testing the feasibility of the electromagnetic telegraph for public use. Congress established the land grant college system and then agriculture experiment stations were added later. In 1937 the National Cancer Institute was created and given the authority to award research grants. The above are examples of research carried out by nongovernment entities with Government funds, but prior to World War II most Government research was performed ''in-house''. With the demands of war, both hot and cold, and the nearly explosive development of science and technology the Federal Government turned to the personnel and facilities of colleges and universities as a source of research expertise. Federal activity in this area has been principally in the form of financial arrangements which make the research possible. In 1940 approximately $15 million was spent by the Government for research and development at institutions of higher education.[1] The amount expended reached $450 million in fiscal year 1954,[2] $1.4 billion in fiscal year 1962[3] and an estimated $2.149 billion for fiscal year 1975[4] which amounts to approximately 11.4 percent of the research and development budget of the Federal Government. This progression was not linear; there were years of great increases and of relatively static funding. These gross figures do not reflect the uses to which the funding agencies put these funds. Funds for 1973 were distributed nearly equally between basic and applied research with a small sum devoted to development.[5]

The distinction between basic research, applied research, and development is an expression of the different primary purposes which prompt Government agencies to have work performed on campus. The purpose of basic research is essentially to conduct research in a given field, not to produce a predetermined process or product. It provides the broad scientific and educational base required for the entire range of technological advances on which society depends. Applied research is oriented more toward a predetermined objective, though it still entails an addition to present scientific knowledge. Development is best characterized as the process by which a predetermined and, usually, immediately useful process or product is generated. These classifications of activity are discrete concepts which have had an effect upon the development of the funding mechanisms used for each.

The Federal Government and institutions of higher learning have become interdependent elements of the research structure. Colleges and universities cannot adequately support a high level of research activity with their own limited funds, and the Government must rely upon the obvious wealth of expertise on campus for the conduct of research required for national goals.

The Federal Government does not simply ''give'' money to persons or institutions interest in pursuing certain research. Congress requires detailed accountability for federal funds and, over a time, a complex system has been developed by the Government to provide it. Agencies dispensing research funds are responsible to Congress for the manner in which they allocate funds and for the eventual uses to which individual researchers actually put those funds. The awarding of research support involves careful selection of the research to be performed and evaluation of the capabilities of the research personnel. Various restrictions and conditions are placed upon the researcher's use of the funds. The funding agency also imposes restrictions and conditions upon the conduct of the research, the nature of which varies depending on the work to be done and the interests of the agency.

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[1] Foreword to ''The Administration of Government Supported Research at Universities.'' Bureau of the Budget, March 1966.

[2] Federal Support of Basic Research in Institutions of Higher Learning. Committee on Science and Public Policy, National Academy of Sciences, Washington, D.C., 1964, p. 59

[3] Ibid.

[4] 24 Higher Education and National Affairs, Feb. 7, 1975, at 8.

[5] The actual figures are: Basic Research $1,024 million; Applied Research $929 million; Development $173 million. Federal Funds for Research, Development and Other Scientific Activities; Fiscal years 1971, 1972, 1973. Surveys of Science Resources Series, Vol. XXI, National Science Foundation, 1972, p. 12.

These conditions and restrictions are part of the agreement made between the funding agency and the institution where the research is conducted. There is considerable variation in the manner in which the terms and conditions are made part of the agreement. In most contracts, if not all, they appear as general requirements which are either set forth in the body of the contract or set out in an appendix or attachment to the contract. Research contracts with the service branches of the Department of Defense may simply list the pertinent Armed Services Procurement Regulation (ASPR) clauses, thereby incorporating them, and refer the Contractor to the regulation for their content. Grant awards often are less formal on the surface. Though they may include their general conditions in an appendix or attachment, they often simply incorporate the policies and conditions of the agency's grant administration handbook as they apply to the particular grant.[6] In fact some agencies do not make reference to terms and conditions explicit in the award document but do include them in the instructions for proposal submission. As a result, the grantee must be aware of the content of the agency handbook in order to know the full provisions and implications of the agreement into which it is entering. In any event the conditions become a part of the agreement and thereafter determine the rights and duties of the parties to the agreement.

A clear understanding of the conditions and an appreciation of their effects are of obvious importance to anyone entering into a research agreement with the Federal Government. This guide has been compiled to provide individuals dealing with funding agencies the background required to understand the nature of the relationship created and the consequences for the institution. This guide has been structured to present relevant material in a clear and useful format.

The first part consists of sections describing the salient characteristics and procedures of the research grant and the research contract. This material is presented primarily to assist those who do not have extensive experience in the areas of either federal grants or contracts.

The second part includes analyses of approximately 100 contract clauses developed for use in research contracts with the Federal Government. It is believed that a working knowledge of this information will benefit both the funding agency and the recipient institution and make their relationship more productive.

The third part consists of materials of two basic types. The first section provides background material on the development of the cost principles and the second presents the policies and procedures of 43 private foundations and Volunteer Health Agencies. The remaining sections consist of three specimen agreements, and a large number of specimen contract clauses covering a broad range of topics. This material is intended to be used as a resource (to be amended as necessary to satisfy the needs of individual institutions) and as an aid in negotiating contracts with nongovernment parties.

The final part is made up of a glossary and alphabetical index which will assist the research administrator and investigator in using this guide as a reference.

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[6] The following excerpt from a letter dated May 28, 1974 awarding NSF grant GP-43941 is an example of the incorporating language used:

''The provisions of FL 25, 'Administration of NSF Project Award,' attached, are applicable to this grant.''

''Appropriate provisions of NSF 73-12, 'Grants for Scientific Research,' are applicable to the scientific or technical direction of the project and the preparation of technical reports.''

Paragraph 1.c of FL 25 states that:

''The grant shall be administered in general accordance with the applicable policies and procedures contained in NSF 73-26, NSF Grant Administration Manual (October 1973). This attachment identifies selected conditions which, unless otherwise stated in the award letter, are specifically applicable. References in this attachment are to the chapter, section, paragraph of NSF 73-26 which governs.''

RESEARCH GRANTS — THEIR REAL NATURE

The Federal Government spends large sums of money to support research performed by institutions of higher education. These funds are made available to colleges and universities under written agreements whose terms and conditions vary not only from one agency to another, but also from one project to another. Depending on the agency procedure used, these research agreements have taken the form of either the grant, contract, or a hybrid thereof.

The focus of this section is on ''grants'' and the real nature of grants. Grants cannot be discussed, however, without referring to Government contracts to define the legal relationship created and to describe their application and content. (The section which follows this discussion of grants is devoted to an analysis of research contracts.)

Grant-Contracts, Misconceptions

The task of defining the nature of grants is a difficult one because there are many factors which serve to prevent a clear perception.[1] One important factor is the semantic distinction created by the use of the terms ''grant'' and ''contract''. The word ''grant'' connotes a gift, and grants are often thought to be more donative than they really are. There is also a widespread belief, which is not necessarily true, that the legal nature of a ''contract'' inhibits the intellectual freedom necessary for basic scientific research.

Earlier Congressional use of the grant mechanism — involving land grants to encourage and reward the development of the nation's railroad system — may have contributed to the misconception of the grant as a gift. An additional influence was the development of the ''grant-in-aid'' under which federal funds were made available to partially or fully finance certain specified and limited activities of state and local Government agencies.

This misconception has given rise to a widespread and persistent misunderstanding of the relationships which either form creates between the funding agency and the performing institution. On the one hand, grants are often viewed as providing a source of research funds with minimal restrictions or federal direction and over which the institution and researcher may exercise control On the other hand, contracts are believed by many to involve the inescapable imposition of federal control in all aspects of the research project.

Historical Basis of Research Grant

The introduction to this guide included a short history of the Federal Government's activity in supporting research, up to the time of the formation of the National Cancer Institute in 1937. That Institute was the first agency authorized to award research grants, and the development of the grant as an important funding mechanism has paralleled the increase in Government funding of research performed by nongovernmental personnel.

This relationship is illustrated by the pattern of grant use by the National Institutes of Health (NIH), which was formed in 1944 by combining the National Cancer and other health related institutes. In 1947 the total amount of grant support for NIH was 3.5 million and in 1948 was 10.1 million. By 1950 NIH had made 2,665 research grants.[2] In that year federal use of the grant was expanded when the National Science

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[1] A standard definition of a ''grant'' was not found in the research for this guide. Army regulation 70-5 explains a grant as ''an award of funds or equipment included in a written agreement executed by a grantor agency of the Department of Defense (DOD) under the authority of P.L. 85-934.'' PHS defines a grant as ''an award of funds, based on an approved budget, to carry out an activity or program.'' GRANTS POLICY STATEMENT, PUBLIC HEALTH SERVICE, Department of Health, Education and Welfare, DHEW Publication No. (OS) 74-50,000, at 3 (1974).

[2] Table: Number and Amount of Research Grants Awarded by the National Institutes of Health, Fiscal Years 1938-1972, The National Institutes of Health Almanac, 1973, DHEW Publication No. (NIH) 73-5, at 120.

Foundation was created and authorized to award grants to support scientific research.[3] This sporadic growth in the use of grants continued until the launching of Sputnik I in 1957, when the resulting shock prompted serious concern with national research capabilities.

The Grant Act — P.L. 85-934[4]

The Grant Act of 1958 principally resulted from the efforts of Dr. Alan T. Waterman who, at the time, was the Director of the National Science Foundation and an advocate of the superiority of the grant over the contract as a method for supporting scientific research. Dr. Waterman's proposal was communicated to Senator Hubert H. Humphrey who was chairing subcommittee hearings on aspects of the Science and Technology Act of 1958. Senator Humphrey proposed a separate bill (S. 4039) embodying Dr. Waterman's proposal, and incorporated consideration of this bill into hearings already scheduled by this subcommittee.

The Senate hearings[5] were primarily devoted to the Science and Technology Act of 1958 and illustrate the difficulties inherent in attempts to characterize research grants. The Grant Act was of distinctly secondary interest to the Senators and to the witnesses, with the exception of Dr. Waterman.[6] Their principal concern seemed to be in gaining assurance that the act would merely authorize all agencies with power to contract for research to use the grant as an alternative instrument without creating a demand for new appropriations. However, there was some interest in the second section of the act which empowered federal agencies to vest title to equipment purchased with federal monies in the organization doing research under the research grant or contract.

The attention which was paid to the Waterman-Humphrey proposal illustrates the difficulty of attempts to characterize research grants. Dr. Waterman drew a distinction between research contracts and grants with respect to both their objectives and the manner in which they are conducted: a contract was to be suited to support a specific piece of research directed toward a special problem; a grant was to be used for fundamental research in which the judgment of the investigator was the only limiting factor. Dr. Waterman's goal was freedom of action for the scientific researcher. He saw certain advantages to be gained through use of a grant rather than a contract: First, because the grant [erroneously] connoted a gift it created a psychological relationship between grantor and grantee encouraging scientific freedom. Second, no effort was necessary to modify the procurement regulations to suit the conduct of basic scientific research. Third, it was an advantage, according to Dr. Waterman, for the grantor agency to be able to make payments without extensive vouchering and progress reports, thereby reducing the paperwork required of the investigator.

Dr. Waterman's statement gave only one view of the grant; evidence of another approach was presented at the same hearings. Dr. C.W. Schilling, Deputy Director of the Division of Biology and Medicine of the Atomic Energy Commission, in endorsing the bill and discussing the AEC's attitude toward its limited statutory grant power for education and training activities, said:

> To be eligible for these grants, the educational institution must meet certain prescribed requirements, which leads me to mention that a grant in our mind is

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[3] The authorization for the NSF to use grants to support research appears to have been caused by an effort to provide as much latitude as possible to the new agency. The authorizing language provides, among other things, for the agency to perform its support functions ". . . by making contracts or other arrangements (including grants, loans, and other forms of assistance) . . . " 42 U.S.C. §§ 1862 (a) (1) and (b) (1970).

[4] An Act to authorize the expenditure of funds through grants for support of scientific research, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The head of each agency of the Federal Government, authorized to enter into contracts for basic scientific research at nonprofit institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research, is hereby authorized, where it is deemed to be in furtherance of the objectives of the agency, to make grants to such institutions or organizations for the support of such basic scientific research.

Sec. 2. Authority to make grants or contracts for the conduct of basic or applied scientific research at nonprofit institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research, shall include discretionary authority, where it is deemed to be in furtherance of the objectives of the agency, to vest in such institutions or organizations, without further obligation to the Government, or on such other terms and conditions as the agency deems appropriate, title to equipment purchased with such grant or contract funds.

Sec. 3. Each agency or department of the Federal Government exercising authority granted by this Act shall make an annual report on or before June 30th of each year to the appropriate committees of both Houses of Congress. Such report shall set forth therein, for the preceding year, the number of grants made pursuant to the authority provided in the first section of this Act, the dollar amount of such grants, and the institutions in which title to equipment was vested pursuant to section 2 of this Act.

P.L. 85-934; 72 STAT. 1793, 42 U.S.C. §§ 1891-1893 (1970).

[5] Hearings on S. 3126 and S. 4039 before the Subcommittee on Reorganization of the Senate Committee on Government Operations, 85th Congress, 2nd Session, ser. 25589, Part 2 (1958).

[6] The best expositions of Dr. Waterman's views are contained in his written explanation of the proposed legislation, id. at 301-2, and in his written statement submitted to the committee at the hearings id. at 347-8.

> not intended as an outright gift to the research institution. They would have to meet the same rigorous scientific standards now required for support by contract.[7]

Dr. Schilling contemplated that somewhat more stringent requirements be placed upon a grantee than did Dr. Waterman. In the subsequent years Dr. Waterman's view has persisted, however, both in the minds of grantees and, perhaps to a lesser extent, in the minds of federal administrators. In 1962, Dr. James A. Shannon, Director of the National Institutes of Health, described the essence of the grant to be ''. . . a gift given to an individual in support of some general activity which is felt to be desirable by the granting agency.''[8] However, he also noted that ''In point of fact, . . . a contract can be as loose as a grant; or a grant can be as tight as a contract.''[9] Dr. Shannon's comment illustrates the fact that basic scientific research can be conducted under either a contract or a grant agreement. Indeed, Dr. Waterman's list of advantages of the grant over the contract form was designed to show supposed benefits of the grant; but these very same advantages also become attainable within a contract. The heart of the supposed distinction between grants and contracts is reducible to the attitudes of and psychological relationship between the sponsor and institutional personnel. This Dr. Waterman had acknowledged.

Activity After the Grant Act

Despite the rhetorical distinction between grants and contracts, labels are not determinative in fixing the attitudes and behavior of Government administrators. The Grant Act simply authorized use of the grant instrument; no effort was made to require the development of Government-wide principles. Each agency was free to accept the grant mechanism in the manner it felt proper, subject only to whatever oversight Congress saw fit to exercise. The result was diversity in form, content and use.

In 1964, the House Select Committee on Government Research published a report on the Administration of Research and Development Grants.[10] The House Select Committee had been examining contracts and grants, and had initially accepted the grant-contract dichotomy. The Committee found no ''. . . significant distinguishing characteristics between the two instruments [contract and grant] based upon either the subject matter of the research to be done or the type of research to be supported.[11] It concluded that the early potential advantage of the grant's simplicity and efficiency ''. . . has been drowned in a morass of administrative detail,'' and recommended that if the grant could not be rescued ''. . . the fiction of differences between grants and contracts should be obviated, and the grant eliminated, to be replaced openly and unequivocally by the contract.''[12] Despite all the discussion referenced above, the dichotomy still persists to this day — as evidenced by DHEW's recent reaffirmation of the distinction between them.[13]

Legal Nature of Grant

Any realistic study of the supposed dichotomy between grants and contracts must eventually come to the conclusion that the Select Committee reached. Indeed, even the semantic distinction between federal research grants and federal research contracts is blurred. Though agreements exist which are internally consistent in defining themselves as grants, a number are labelled as grant-contracts. The inherent difficulty lies in the concept of a grant as something other than a contract. A contract is, in essence, an exchange of promises between two parties. In order to be other than a contract, a grant would have to be an unconditional gift (i.e. the transfer of funds to a researcher without restrictions or promises being given in return). Because restrictions and conditions are included in grants, logic dictates that in reality a grant is simply a form of contract.

Fortunately, a more secure basis than pure logic exists for the conclusion that a grant agreement is in reality a contract. There are no court decisions dealing explicitly with a grant for basic scientific research. However, an analogy may be drawn with decisions concerning grant-in-aid to local school districts. In order to receive federal funds, local school boards near large federal military bases have had to give assurance that the facilities would be available to the children of federal employees in the same manner as for all other school children in the district. In addition, after the Supreme Court struck down the maintenance of segregated public school systems, desegregation became an unstated element in the assurances given by the local authorities in order to receive federal funds. In **U.S. v. Frazer**[14] and **U.S. v. County School Board, Prince George's County, Va.**[15] District Courts held that promises made by the local school boards as prior conditions to receiving federal funds, created an enforceable contract between the parties. Because of these assurances the school boards were required to stop operating segregated school systems.

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[7] **Supra** n. 5 at 365.

[8] Hearings on the Administration of Grants by the National Institutes of Health before a subcommittee of the House Committee on Government Operations, 87th Cong., 2nd Sess., ser. 82540, at 79 (1962).

The Shannon philosophy of a grant as a gift was included in PHS policy statements until 1972. The ''basic nature of a grant as a conditional gift'' was referred to as late as the July 1, 1967 issue of ''Grants for Research Projects: Policy Statement.'' This remained in effect until the subsequent issue by NIH of a brochure under the same title dated July 1, 1972.

[9] **Id. Hearings** at 45.

[10] Study No. 1 — Administration of Research and Development Grants, Report of the Select Committee on Government Research of the House under authority of H. Resolution 504, 88th Congress, 2nd Session, 1964.

[11] **Id.** at 60.

[12] **Id.** at 64.

[13] DHEW, Grants Administration Manual, Chpt. 1-10, May 17, 1974.

In the rulings discussed above the courts relied on two earlier Supreme Court cases[16] dealing with Congressionally authorized land grants to railroads. The basic holding in these cases was that the railroads had been at liberty to accept or reject the terms of the grant, but by accepting the conditions of the grant they had entered into a contract. Aware of the common misconception related to grants, the Supreme Court felt it necessary to state that ''. . . the grant should not be treated as a mere gift.''[17]

The Comptroller General of the United States has followed this line of case law in interpreting the legal nature of grants[18] of various types. The recurrent principle is that acceptance of a grant ''. . . which is not unconditional but is subject to conditions which must be met by the grantee creates a valid contract between the United States and the Grantee''[19] and that ''. . . monies paid over to the grantee, while assets in the hands of the grantee, are charged with the obligation to be used for the purposes and subject to the conditions of the grant.''[20] The application of this line of reasoning to federal research grants could not be clearer.

The Grant Agreement

As the House Select Committee[21] concluded, the grant agreement has become so encumbered with restrictions and conditions that it is virtually indistinguishable from the traditional contract. What has happened, in effect is the convergence of grants and contracts with respect to the number and character of their terms and conditions. This is not to say that the grant and contract documents are identical, though, as will be shown, there appears to be a trend towards a uniformity of conditions. Rather, grant agreements have become more complex documents and more closely resemble the common conception of contracts.

As the need for restrictions upon grant recipients was perceived, conditions were imposed. Since no set of regulations was developed for Government-wide application, such as for contracts (the Armed Service Procurement Regulation or Federal Procurement Regulations) each agency which chose to use the grant developed its own set of guidelines. Each agency was free to draft grant regulations which were suited to its needs, based upon the agency's own policies and procedures.[22] Often these statements of policy were not reduced to as precise a delineation of rights, duties and procedures as that found in the ASPR and FPR contract clauses. As a result, the terms of grant agreements vary from one agency to another, and are often stated in a much more vague manner than ASPR or FPR clauses which apply to the same subjects. Consequently, the rights and duties of an institution, in some instances, may have to be found in sources other than the grant agreement, a situation less likely to arise under Government contracts.

The variety of conditions included in grant agreements become apparent when comparing different agencies' publications dealing with grants. Indeed, it is only by examining an agency's grant policy or administration handbook that one can know the full content of the contract entered into, since the typical grant agreement itself is a brief document. A funding agency may attach a list of general provisions to the grant agreement which, by express incorporation, become additional terms of the agreement. Alternatively, it may incorporate an entire agency publication as the statement of governing conditions and policies. The National Science Foundation (NSF), for example, has chosen the latter approach, even though it also attaches a preprinted sheet which indicates specific sections of the incorporated Grant Administration Manual, NSF 73-26 ''which are specifically applicable.''

Cost Principles

Although grant provisions vary a great deal, the financial aspects of research grants have been explicitly developed into a uniform set of principles. The core document upon which the funding agencies' cost policies are premised is Federal Management Circular (FMC) 73-8: **Cost Principles for Educational Institutions,** now published by the General Services Administration.[23] This circular, first published in 1958, sets forth rules to determine whether or not costs may properly be charged to research agreements[24] between the Federal Government and educational institutions.

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[14] 297 F. Supp. 319 (M.D. Ala. 1968).

[15] 221 F. Supp. 319 (E.D. Va. 1963).

[16] U.S. v. Northern Pacific Ry. Co., 256 U.S. 51, 41 S. Ct. 439, 65 L. Ed. 825 (1921). Burke v. Southern Pacific Ry., 234 U.S. 669, 34 S. Ct. 901, 58 L. Ed. 1527 (1914).

[17] Burke, supra. n. 17, 234 U.S. at 679, 348 S. Ct. at 911, 58 L. Ed. at 1544.

[18] 42 Comp. Gen. 289 (1962). 50 Comp. Gen. 470 (1970), 51 Comp. Gen. 162 (1971).

[19] 50 Comp. Gen. at 472 (1970).

[20] 42 Comp. Gen. at 294 (1962).

[21] **Supra.** n. 12.

[22] Some effort has been made to standardize the policies of grantors in certain areas. The development of a uniform set of cost principles, discussed infra., and the publication of a series of Federal Management circulars by the General Services Administration which cover cost-sharing (FMC 73-3), audits (FMC 73-2, 73-6), and some other matters are examples of this activity.

These cost principles resulted from a cooperative effort of the Federal Government and the colleges and universities (see Part III Section A — Supplementary Reference Material for a history of the cost principles' development).

The basic concept of the cost principles is that of "allowable costs" — those costs which are related to the conduct of the research. These allowable costs are both direct and indirect. Direct costs are those incurred solely for work on the research project and indirect costs are those which are incurred primarily for necessary supporting administrative and service activities related to the research project.[25] Though the concepts are relatively simple, the mechanics of determining indirect cost can be complex. In essence, an effort is made to determine the portion of general purpose costs attributable to organized research as distinguished from instruction and other institutional activities. Thus, a part of the institution's maintenance and operation expenses is assigned to research as indirect costs in the proportion that the research effort bears to the total operation. Under this principle, the entire cost of an office devoted completely to research administration is an allowable indirect cost. On the other hand no portion of the cost of commencements or convocations is an allowable indirect cost for research.

Once the indirect cost elements of research are identified they are aggregated. This pool is then related to an appropriate base, such as the total direct salaries and wages assigned to organized, i.e., separately budgeted, research, and expressed as a percentage which is the indirect cost rate. In a given research grant or contract this rate is then used to determine the amount of indirect costs which are allowable under the agreement. Use of both the Circular 73-8 FMC and published financial guidance provided by the funding agency creates a relatively complete system within which the allowable costs of research are determined.

Cost Sharing

Cost principles do not provide a final determination of the funds which will actually be provided. They determine the allowable costs but not the amount which the grant recipient will in fact receive as reimbursement for its costs. Because of the belief that a grant recipient receives benefits beyond the reimbursable costs of supported research, there has been a widespread conviction among funding agencies that recipient institutions should participate in funding the research. The initial method used to accomplish this financial participation was through percentage limitation placed on the amount of reimbursable indirect costs. Agencies initially used this technique as a matter of internal policy and in the early 1960's through the appropriation acts for various agencies, Congress imposed indirect cost reimbursement ceilings upon grants.[26] In 1965 Congress changed its approach for fiscal year 1966 and thereafter, placing the limitation on grantor agencies that federal funds not be used to pay all the costs of a research project funded under a grant instrument. This permitted cost participation to be in any element of cost rather than requiring it to be in the form of reduced indirect costs.

However, in 1968, Senator Mansfield introduced an amendment to an appropriations bill which would have limited indirect cost reimbursement to 25 percent on both research grants and contracts. The proposal was not enacted,[27] but it did precipitate discussion of the problems involved in requiring cost participation by educational institutions. The major conclusion of this discussion was that percentage limitations on indirect cost reimbursement are too inflexible in an area of widely varying circumstances. The indirect cost rates of institutions are significantly affected by several factors — factors which are not related to the relative efficiencies of the institutions.[28] The cost accounting system largely determines the manner in which costs are assigned to research or other areas, and the manner in which the cost pools are formed. The physical circumstances surrounding the performance of research affects the classification of costs as direct or indirect. For example, the isolation of a building and its total use for a project may make its attendant costs direct whereas mixed use of the building for several purposes would give rise to an apportionment of indirect costs. Congress was aware in 1965 that the use of indirect cost reimbursement ceilings had the effect of arbitrarily penalizing or unnecessarily influencing an institution's choice of accounting system or type of research. This understanding led to endorsement of the concept of ''cost sharing'' — a concept requiring that funds not be awarded to meet the full expenses of the research to be performed. From 1965 to 1968 the appropriation bills had required cost sharing on all research grants.[29] The approach was changed in fiscal year 1970 in the appropriation acts for HUD and the independent agencies which include NASA and NSF. For these agencies cost sharing was thereafter required for all research grants and contracts resulting from unsolicited proposals.[30] To clarify the varying instructions from Congress, OMB issued circular No. A-100, which promulgated guidlines for cost sharing by performers of federally sponsored research. This circular has since been reissued as Federal Management Circular 73-7.

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[23] This circular was previously published by the Office of Management and Budget (OMB) as Cir. No. A-21. Responsibility for cost principles was transferred to GSA and A-21 was republished without change under the new designation.

[24] The material presented by the circular also appears in the Procurement Regulations, ASPR § 15-3, FPR § 1-15.3.

[25] Commission on Federal Relations, American Council on Education, Direct and Indirect Costs of Research at Colleges and Universities at 3 (1969).

[26] Hearing on Federal Support of Project Grants: Indirect Costs and Cost Sharing, before the Subcommittee on Government Research of the Senate Committee on Government Operations, 91st Cong., 1st Sess. Ser. 29-461, Parts I & II (1969). For example, in the NASA appropriation acts Congress limited indirect cost reimbursement to 25% of total direct costs for FY 1963 and 20% in FY 1964 and FY 1965.

[27] **Id.** at 3.

[28] Commission on Federal Relations, American Council on Education, Direct and Indirect Costs of Research at Colleges and Universities 7 (1969) and Subcommittee on Government Costing Policies, Comm. on Governmental Relations, National Assoc. of College and University Business Officers, Indirect Costs: A Problem in Communication, Studies in Management, July, 1974.

In the Senate hearings on cost sharing[31] there was some call for a permissive system under which the level of cost sharing on a research project would be determined by the circumstances of the project and the interests of the parties. The cost sharing requirements of the appropriation acts and their implementation by the grantor agencies indicate consideration of such individual facts and circumstances. NSF follows the language of the act indicating that its funding acts require that all unsolicited proposals resulting in grants must have cost sharing.[32] The Public Health Service (PHS) indicates that cost sharing proposals are required for all research grants where full indirect cost reimbursement is not prohibited by its internal policies.[33] In both cases, a precise pre-set level of cost sharing is not required, but is determined by negotiation. A cost sharing rate may be achieved by averaging an institution's contribution to all research at the institution supported by the particular agency, provided that each project has more than ''token'' cost sharing. NSF considers ''token'' participation to be 1 percent or less of the total cost of a project.[34] After a cost sharing arrangement has been negotiated (if one is required), the total amount of reimbursable direct and indirect costs may be determined.

Financial Management

The preoccupation with cost carries over into restrictions upon managerial aspects of a project. One such restriction is placed upon the ability of the research director to reallocate budgeted funds. The actual procedures involved vary from agency to agency.[35] Certain specific reallocations, or changes in amount in excess of a predetermined percentage, require prior agency approval. These restrictions are enforced by placing responsibility for the proper use of funds upon the institution and requiring periodic financial reports on each grant. If improper expenditures are detected during the period of a grant, delay in the advancement or reimbursement of funds may result until the matter is resolved. In an extreme case a grant could be terminated. After all work under a grant has been completed and all final reports have been made, financial records are subject to audit for three additional years. If an audit results in a finding of improper use of funds, the institution may be required to repay to the Government those grant monies which were improperly used.

Statutory Requirements

When the focus of attention is shifted to the full range of research conduct under the grant, one encounters a large number of clauses founded on policy decisions made by Congress and the particular agency involved. The conditions based on Congressional policy decisions are expressed in statutory requirements that those doing business with the Government (or, often, doing any business) should conform to certain standards of conduct. These provisions make up a substantial portion of the ''boilerplate''

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[29] Starting with appropriation bills in 1965 the following language appeared:

''None of the funds provided herein shall be used to pay any recipient of a grant for the conduct of a research project an amount equal to as much as the entire cost of the project. Department of Defense Appropriation Act of 1965, §638, P.L. 89-213.''

[30] The following language was used in appropriation bills passed from 1969 on:

''None of the funds provided in this Act may be used for payment, through grants or contracts, to recipients that do not share in the cost of conducting research resulting from proposals for projects not specifically solicited by the Government: **Provided**, that the extent of cost sharing by the recipient shall reflect the mutuality of interest of the grantee or Contractor and the Government in the research.''

Section 508 — P.L. 91-556, 84 Stat 1442.

[31] **Supra.** n. 26.

[32] § 202, NSF Grant Administration Manual, NSF 73-26 (1973).

[33] GRANTS POLICY STATEMENT, PUBLIC HEALTH SERVICE, Department of Health, Education and Welfare, DHEW Publication No. (OS) 74-50,000, at 38 (1974).

[34] **Supra.** n. 32, Section 202.3.

[35] In order to minimize such differences the Government has issued a policy statement designed to provide the greatest amount of consistency in the administrative policies and practices associated with federal research grants. Federal Management Circular FMC 73-7: Administration of College and University Research Grants (1973).

(standard terms) of both grants and contracts, cover a broad range of activity, and include requirements of both a negative and positive nature. There are many of these and they are listed in the section of this guide which analyzes the contract terms which commonly arise in the research contract context. However, a few examples are offered as follows: (1) Grant recipients are commonly required to give assurance of compliance with the terms of the civil Rights Act of 1964 and the regulations developed to ensure equal employment opportunities. (2) Grantees are required to safeguard the rights and welfare of human subjects and the welfare of laboratory animals. (3) Data surveys and data gathering forms involving individuals must receive prior Government approval before being used under certain circumstances. (4) A provision implementing the Buy America Act is often included. (5) Grant recipients are made aware of the impact of the Freedom of Information Act which mandates public access to aspects of their research proposals and reports made to the grantor agency. (6) Grant recipients are encouraged, but not required, to make use of concerns that are minority owned, or small businesses, or which are located in ''labor surplus areas'' in their purchasing or subcontracting. Such conditions sometime occur in agreements where they are clearly inapplicable.

Agency Policy

Conditions imposed as a matter of agency policy deal with more narrow aspects of a grantee's actual performance of research under the grant. As difficulties are experienced or potential problems appear, pressure grows to resolve them by a clear statement of agency policies and procedures or by a more accurate description of the relationship created. This evolution of written agreements based upon experience is what occurred in the realm of pure contracts. A similar development of the grant agreement, with liberal borrowing from contract experience and clauses is observable.

The very inability to distinguish between a grant and a contract makes it difficult to arrive at a realistic characterization of ''grant terms'' as opposed to ''contract clauses''. Agreements regarded by the agencies as ''grants'' cover the full range of possible relationships between researcher and supporting party with the exception of outright gifts. A full discussion of this range, and the conditions imposed within it is clearly beyond the scope of this chapter. Illustrations drawn from a few significant areas, however, will give the reader an indication of the diversity of conditions.

Three significant and often overlooked aspects are those grant conditions dealing with ''changes'' in the conduct of the research, resolution of ''disputes'' under the grant, and ''termination'' of the grant prior to completion of the research.

a. Changes

By accepting a grant an institution agrees that a project will be carried out in accordance with the objectives and techniques set forth in the proposal and approved by the grantor. The interest of the grantor may lie in the general advancement of knowledge in a particular field or, more narrowly, in the application of certain techniques to a specific problem. As a result, the degree of control it wishes to maintain over the conduct of research will vary depending on the nature of the project. Researchers are generally accorded the power to make minor changes in methodology or approach in order to achieve the objectives of a grant. However, significant changes normally require prior approval of the grantor through its authorized representative. This requirement may give rise to problems of interpretation since the concept of ''significant change'' is so vague.

The National Science Foundation uses two categories for describing grants:[36] first, those where a definite course of work is not possible; and second, those where greater precision is possible or where the agency considers close control over the project's methods, direction or specifications to be necessary. NSF states as a matter of policy that in grants of the first type the investigator has freedom to pursue alternative approaches. In grants of the second type, however, appropriate controls on freedom of action may be imposed. The Grants Administration Manual then uses the concept of ''significant changes'' to determine which changes in method or procedure under the grant must be reported to NSF. Under the second type of grant significant changes may require the prior approval of NSF. As will be shown, this pattern is consistent with those restrictions in contracts wherein the Contractor does not have the right to mandate changes in the project without consulting with the Contract Officer.

b. Disputes

The problem of determining what a significant change is, and identifying its occurence, may give rise to honest disagreements as to the propriety of actions by the researcher without prior clearance from the grantor. Disputes may arise on other matters as well, which makes the creation of a framework for their resolution desirable. Government contracts normally contain a ''disputes'' clause to which the other contract clauses refer for resolution of disagreements. A similar clause has recently begun to be incorporated in the general conditions governing grants. For example, the DHEW has established a two-tier system of formal and informal procedures for the resolution of conflicts over the disallowance of expenditures, termination for failure to comply with grant conditions, and some other conflicts. The NSF does not have a comparable formal provision in its grants administration manual. However, foundation officials have stated that disputes may be appealed and resolved on an informal basis. The contract disputes clause, after which a grant may be patterned, provides both an exclusive resolution procedure and the standards of decision review (see the contract clause part of this guide).

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[36] § 400 NSF Grant Administration Manual, NSF 73-26 (1973). This is the same as the structure and policy established in Part I, Attachment A, Federal Management Circular FMC 73-7, Administration of College and University Research Grants (1973).

c. Termination

There are many other requirements which are placed on the grantee; these cover interim and final reports, publication and copyright relationships, patent rights and procedures and other matters. The precise nature of the conditions varies among agencies, just as it does in contracts. What is significant is how an agency seeks to enforce compliance with the terms and conditions of the grant. This is basically a question of what sanctions may be invoked. The strongest measure is early termination of a grant, usually occasioned by a material failure on the part of the grantee to comply with the grant's terms and conditions.[37] It is similar to the ''default'' clause in Government contracts.

NSF does not make this type of provision for termination. Rather, it provides for revocation of grants only after consultation with the grantee and researcher. By implication this means that termination may be prompted by other than material failures to comply, which is analogous to the situation created by the second type of Government termination clause, termination for the convenience of the Government. Other agencies do likewise. For example, the Department of Agriculture has developed a special clause for ''termination for convenience'' which applies to research at educational institutions.

These contract termination clauses clearly set forth the respective duties of the parties in the event that they are invoked. They occasionally have been used by grantor agencies in the general provision incorporated in grant-contracts or grants.

The Grant-Contract

Government agencies have continued to support basic scientific research through use of agreements employing standard Government contract clauses. These clauses often have more definite meanings and clearer consequences to the parties than the less precise statement of governing principles by a grantor agency. The necessity for precision in agreements has led to the present situation where a ''grant'' agreement and a ''contract'' agreement often cannot be distinguished by their terms. The fact that must be stressed is that federal agency agreements for support of basic research at educational institutions are written within a framework of varied statutory and policy restrictions. The retention of a false belief in the superior character of that contract which is labeled a grant may actually increase the restrictions attached to the agreement with which the recipient must comply (e.g. cost-sharing).

The most important factor in a relationship which benefits the conduct of research is the attitude of the participating parties. The opportunity to arrive at a mutually acceptable research agreement is created by the parties and not the name by which the agreement is finally identified. Regardless of the form or content of the agreement, if the parties cannot cooperate the project will not be a success. Indeed, the preference of an agency for a contract rather than a grant should be of minimal importance in entering into an agreement. The rational focus should be on the conditions of an agreement as they affect the relationship of the parties and the conduct of the research. This is especially true since the grant has taken on much of the character of a research contract and the same ends are served by both.

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[37] Though not clearly fitting into the classification of termination clauses a relatively new development should be noted, the appearance of a special conflict of interest clause. The Department of Labor has developed such a clause and uses it in research grants. It prohibits former DOL Manpower Administration employees who are working for the grantee from having contact with the administration for a period of two years after leaving Government employment. Violation of the condition can result in very serious consequences. DOL determines the gravity of the violation and can, if it feels the full sanctions are required, terminate the grant and bar the institution from receiving any awards from DOL for a period of up to two years. This was the only such clause encountered, but it may reflect a trend that will be picked up by other agencies. The clause is entitled: Special clause No. Warranty Provision for Awards to Grantees Employing Former Department of Labor Manpower Employees — Limitations on Representational Activities on Behalf of Grantees.

RESEARCH CONTRACTS — AN ADMINISTRATIVE SYSTEM

There is a commonly accepted belief that many faculty research investigators would prefer to avoid entering into research contracts and will choose the grant instrument whenever it is available. The common misconception of a grant as a simpler support document and the legal overtones of a contract, when combined with the sheer mass of the Government's contract regulations, are an ample basis for this attitude. One cannot deny that the body of Federal contract law is large and that some knowledge of it is required to enter into a satisfactory agreement with the Government. However, the arcane nature of federal contract law and intricacies are easily overstated when one deals with research contracts. The fact that grantees have in reality been entering into a contractual relationship, as was demonstrated in the preceding section, may help to reduce the aversion toward the contract as a support instrument. In order to function effectively in the contract area, research administrators and investigators need only add to their knowledge base an understanding of contract procedures and the legal relationships created by a reasonably finite number of contract clauses.

The purpose of this section is to provide the background knowledge needed to make use of the contract clause analyses which follow. It has been structured to give the reader an overview of the federal procurement process and a discussion of the more likely problems which may arise in different procurement stages or under certain contract clauses. This section also attempts to provide an adequate knowledge base to those persons whose knowledge or experience is limited to nongovernmental contracts. The federal procurement contract is an agreement significantly different from the private party contract in several important aspects. Assumptions based on experience with private contracts may prove to be of little value in dealing with Federal Government. Finally, it seeks to introduce Government contracts in general. As agency use of contracts to fund basic research grows, those involved in research can avoid contact with federal contract law and concepts only by ceasing to seek federal funds.

Government Procurement

The history of procurement by the Federal Government is dominated by several themes. The predominant theme is to receive acceptable goods or services at the lowest practical price in order to avoid waste in the use of public monies. Examples of other procurement themes are the avoidance of corruption and favoritism in the awarding of contracts and actions to accomplish certain social goals and policies. These Government interests evolved as the procurement system of the United States was being developed.

Historically, the preferred method of procurement has been formal advertising followed by the submission of a firm price bid by each would-be contractor. Had the system remained this simple it would have fulfilled the Government's policy requirements. However, historical forces served to confuse this process and render it less acceptable. As the size of the Federal Government increased, its procurement needs became increasingly complex in terms of the variety and amounts of goods and services. Changes in technology rendered the goods and services themselves more and more complicated. As the procurement system became more complicated the need for efficiency became increasingly important. However, the inertia naturally generated by an existing structure and by commercial interests which found the procedures beneficial meant that the trend toward complexity continued.

As the United States entered World War II, its procurement system was exceedingly complicated and unwieldly, ill-suited to the task it was expected to perform. The inability of the pre-war procurement system to efficiently meet war materiel demands was quickly perceived and a series of acts were passed which

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1. NIH, for example, has been making increased use of research contracts in the past few years. In 1970, NIH entered into 2,106 research contracts involving $105.3 million. In 1972 there were 3,009 contracts totaling $250 million. While research grants involved much more money for these years, roughly $600 million and $800 million respectively, the increase in research contracts is significant. NIH Almanac 1973, DHEW Publication No. (NIH) 73-5, at 120, 124-5.

streamlined the procurement system in a variety of ways. The most important change was the shift to a system of negotiated contracts. Negotiation bypassed the cumbersome and time-comsuming advertising and bidding procedures developed to satisfy the laws and regulations which had structured the system. Procurement officers were empowered to negotiate contracts in a manner closer to that of private parties. By dealing with more than one Contractor, price competition could be retained and, in addition, factors other than pure price could properly be considered in making contract award decisions.

Procurement Regulations

The end of World War II terminated the temporary statutes under which this streamlined procurement system had been authorized. However, wartime experience and the radically changed nature of some of the armed services' materiel requirements indicated the need for a sweeping change rather than a return to the old system. This reordering of the system was accomplished by passage of the Armed Services Procurement Act (P.L. 80-413) which governs the procurement activities of the Department of Defense. The civilian agencies were placed in a similar system by the Federal Property and Administrative Services Act of 1949 (P.L. 81-152).

Both procurement acts directed that regulations be developed to carry out their policies and purposes. The Armed Services Procurement Regulation (ASPR) was developed first. When the Federal Procurement Regulations (FPR) were established in 1959 by the General Services Administration, it was decided to draw on the Department of Defense experience in developing the ASPR. Using the ASPR as a model for the FPR kept unnecessary proliferation of different Government regulations to a minimum, since the language of many ASPR clauses was used in the FPR with little or no change.

The regulations (ASPR and FPR) establish the major portion of the procedures and contract clauses with which a Contractor must deal. Government agencies (e.g. HEW and HUD) are authorized to issue supplementary rules which implement FPR requirements, but these rules may not conflict with the governing regulations. This complex body of regulations permits a relatively greater amount of flexibility than one might expect. What inflexibility exists is an inherent characteristic of any system of procedures involved in the expending of billions of dollars each year.

The procurement system within which research contracts are awarded and written is representative of the entire process of Government contract procedures. The procurement acts reaffirmed the Congressional preference for procurement by formal advertising to ensure price competition, but permitted by specific exceptions the use of negotiation in some areas. A hybrid form of procurement, two-step formal advertising, was developed to combine the safeguards of formal advertising with the flexibility of negotiation. It provides an alternative which rounds out the set of procedures and makes the procurement system reasonably responsive to the character of the goods and services sought.

Agency Procurement Decisions

An agency may formulate a research project in many ways. The concept may originate within the agency to carry out its mission or, on occasion, be more tangentially related to an area of interest to the agency. Alternatively, the original idea may be that of a researcher outside the Government who either formally or informally approaches the agency with a research topic.

In any event, once an agency decides that research on an identified problem area should be conducted, a determination must be made as to the instrument to be used. Even though in the broad view there is little functional difference between grants and contracts, the internal policies of an agency may retain distinctions for their use. For example, the National Institutes of Health continues to make such a distinction; NIH feels that

> . . . a grant is an instrument to support research, whereas a contract is an agreement to procure research. Grants entail ideas originated and defined by the grantee; contracts contain work requirements specified by the Government (and) . . . offer more universal competitive oportunities to all types of scientific sources and are used by the awarding agency as a means of fulfilling its program objectives.[2]

This would seem to draw a sharp distinction; however, the two are overlapped by another NIH process:

> An unsolicited proposal in some cases may serve as the basis for the Government's competitive solicitation of the subject matter contained in the unsolicited proposal . . . (and) unsolicited proposals may be the basis of a sole source contract award . . .[3]

Thus the origin of the research idea is not determinative of the instrument to be used, a choice which is often, though not always, left up to the agency, as is the degree of competition involved in making the award.

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[2] NIH, A Guide to the NIH Research Contracting Process, DHEW Publication No. (NIH) 74-491, at 1.

[3] Id. at 8.

If the agency elects to support the research with a contract rather than a grant, it is then faced with a choice of procedure to be followed in awarding the research contract. (One should keep in mind that this discussion focuses on cost-reimbursement research contracts with educational institutions which, as will be discussed later, provides more latitude to the agency in choosing its procedures than does procurement from profit making entities.)

Though the formal advertising process is the Congressionally preferred method of procurement (because of the effect of price competition on costs), the criteria for its use markedly restrict its availability. The standards used to determine the effectiveness of pure price competition are relatively simple and obvious. First, the procurement requirement must be suited to full description with complete specifications. Second, there must exist an adequate number of qualified and interested Contractors so as to insure adequate competition. Third, there must be adequate time to permit the procedures of formal advertising to be carried out. If these criteria are met, the agency will normally use the formal advertising procedure.

However, the wartime experience with negotiated contracts identified areas where negotiation proved more efficient than formal advertising. The modern procurement acts recognize this and permit deviations from formal advertising for specified purposes where the procuring agency believes it to be warranted. One of these exceptions is for services of educational institutions and another is for experimental, developmental or research work.[4] The ready availability of the negotiation procedures is the reason why university research administrators and research investigators will seldom come into contact with formal advertising. However, since the exceptions are not mandatory, a fuller description of formal advertising is necessary.

Formal Advertising

If the agency decides to use formal advertising, it then prepares an Invitation For Bid (IFB). This is a full statement of the work to be performed and the proposed contract requirements including contract terms and conditions. The next step is the dissemination of the IFB — the aspect of the process which gave rise to the name of the procedure. The agency selects a number of prospective bidders from its list of potentially interested Contractors and sends them copies of the IFB. Not all Contractors who have indicated a general willingness to bid are automatically solicited. If the list of potential bidders is long, the agency need only contact a sufficient number to insure competition. In addition, the IFB and announcements of its existence and availability are ''advertised'' in various ways intended to bring it to the attention of other potential bidders. The responsibility for acquiring such information is placed on the Contractor. Contractors then submit sealed bids which are publicly opened and evaluated for conformity with the IFB. The procedure is more complex than this, involving a multitude of rules which are strictly enforced to preserve the competitive nature of the process. Failure to comply with the rules by either the Contractor or agency can void a contract award and require repetition of the entire process. If the regulations have been fully honored, the Contracting Officer may then award the contract to the lowest responsible conforming bidder, unless all bids are rejected or the IFB is cancelled.

Two-Step Formal Advertising

The hybrid form of advertising and negotiation, two-step formal advertising, was developed for use where formal advertising is desirable but the object of the procurement is not suited to a sufficiently precise description to permit its use. It may be encountered in research procurement when: (1) the Government agency has a clear concept of what it wants, (2) there are adequate standards to measure the acceptability of proposals, and (3) there exists a number of ways of meeting the procurement objective. One example would be that of a need for development of a system using solar energy for heating and cooling buildings. An additional example would be the development of a prototype health management organization on which formal advertising could later be based. Where there exists this requirement of development or research the two-step procedure may be followed. In the first step the focus is on the development of technical proposals by Contractors who are notified of the potential contract in a manner similar to formal advertising. Proposals are evaluated under the technical criteria established in the Request for Technical Proposal which is used in place of the IFB. No price considerations or cost information is considered at this stage. The procuring agency has the discretionary power to contact a potential Contractor to have additional information submitted where it is felt that the technical proposal may thereby be made acceptable. Those Contractors submitting acceptable technical proposals are then issued IFBs. Their bids are to be based solely upon their own accepted technical proposals and the procedure otherwise matches that under one-step formal advertising. In the event that only one acceptable technical proposal is received, the agency may have the option of continuing the procurement through negotiation of a sole source contract.

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[4] 41 U.S.C. §§ 252(c)(5) and (11)(1970) and 10 U.S.C. §§ 2304(a)(5) and (11)(1970).

Negotiated Procurements

It should be evident from the description of the formal advertising processes that they are not well suited to the procurement of basic research from educational institutions. Though one can conceive of research projects with sufficiently narrow scope and goals to be suitable for formal advertising, the characteristics of basic research normally make such a procurement approach essentially impossible. The classic form of basic research involves work at the frontier of knowledge and the elements necessary for a successful project are not susceptible to expression in terms of precise specifications. The skills, interest and availability of research personnel and the resources at their disposal are all factors to be considered in selecting the research Contractor. These are factors which could not be given adequate consideration within the formal advertising framework.

Fortunately, the drafters of the procurement acts understood that such factors should be given weight. Again, contracts for the services of educational institutions are specifically recognized as proper subjects for negotiation,[5] an exception from the general rule that procurement must be by formal advertising. Indeed, other exceptions require formal justification in the form of ''Determinations and Findings'' by the head of the agency involved, but none is required in order to negotiate a research contract with an educational institution.

The fact that costs are not the primary consideration under negotiation does not mean that there is no competition in the award of research contracts. Because of the personnel or research facilities available, there may occasionally be only a single potential Contractor. However, this is not the normal situation for which the negotiation process is designed. The potential for competition has been structured into the negotiation process where it may appear in cost considerations as well as in subjective evaluations of potential performance. Indeed the consideration of a broad range of factors generally stimulates competition rather than reduces it. The least expensive researcher may not be the best choice for success on a project and the examination of other criteria may identify better, though more expensive, Contractors.

The first step in the negotiation process is to give notice of the research opportunity to potential Contractors. This is accomplished in the same manner as in two-step formal advertising, by notices directed to specific institutions and by general announcements. Various agencies publish announcements of research opportunities in the Commerce Business Daily (CBD). Others, in addition to CBD notice, have their own supplements for announcing possible contracts (e.g. the ''NIH Guide for Grants and Contracts''). Researchers who respond to these announcements, and those the agency feels would be interested and qualified for a particular contract, receive Requests for Proposal. The crucial element of the RFP is the statement of work to be performed. NIH describes this as ''flexible enough to give offerors reasonable discretion to present their own approaches to the contract objectives, but specific enough to give offerors confidence they are competing on the same basis.''[6] The RFP also includes a statement of the criteria that will be employed in evaluating the research proposal.

The proposals are evaluated by the Contracting Officer through the use of specialists in two areas: technical content and cost. The technical evaluation is made on the basis of the criteria stated in the RFP and is often performed by specialized review boards made up of scientists engaged in the field of the proposed research. If the proposal is found to be acceptable technically, it then undergoes cost analysis to determine whether its price lies within an acceptable cost range. After these analyses the agency selects a number of proposals which become the basis of contract negotiation. Questions which were raised in the course of the analyses are resolved by discussion between the Contracting Officer and the proposing party. Each party deals only with his own proposal and is supposed to be unaware of his competitive position during the negotiations. An offeror may be asked if his bid is his best price, but the Government may not use auction tactics to reduce the cost. Also, during the negotiations the offerors may be provided the opportunity to revise their proposals as dictated by the course of the negotiations. A fixed date is set for the closing of negotiations, by which time all revisions must have been received. The proposals are then evaluated, a determination made as to whom will be awarded the contract, and the unsuccessful parties notified.

Characteristics of Government Contracts

In the preceding discussion of the procurement process no attention was paid to the immediate goal: the contract. The remainder of this section focuses on the characteristics of the Government contract. The following material presents certain of the legal characteristics of federal contracts which, for the most part, are not explicitly stated in the contracts formed under the procurement regulations.

The procurement regulations constitute, in a sense, a pool of contract clauses which, in the Government's view, most adequately define the respective rights, duties and relationships arising between

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[5] 41 U.S.C. § *252(c)(5) (1970), 10 U.S.C.* §§ 2304(a)(5) and 2358(1) (1970).

[6] NIH Research Contracting, **supra.** n. 2., at 6.

Contractor and Government. Thus they are similar to a collection of completed contracts kept by lawyers or commercial firms as an aid in drawing up future agreements. The contracts developed by this system are similar in most respects to those entered into by private individuals. There do exist some marked substantive differences, however, which are based upon the special nature of Federal Government. As may be anticipated, one is not in the same bargaining position when dealing with the Federal Government as the position one would be in with a private party. The ability to dictate contract terms is normally a function of the relative power of the parties. This is true as well in contracting with the Government, with an additional twist. Congress can and does require that Contractors agree to act in accordance with certain policies expressed by statute. These required clauses cover diverse subjects ranging from minimum wages to civil rights to the use of small businesses for subcontracting. Though the required clauses may not be relevant to a given contract they will usually appear therein as part of the ''boilerplate'' — the term often used to describe the general provisions of Government contracts.

Christian Doctrine

Another important facet of Government contracting deals with the legal status of the regulations governing procurement. Since the regulations are developed pursuant to the direction of Congress, the Courts have held that the procurement regulations have the force of law.[7] This gives rise to what is known as the Christian Doctrine, under which clauses required to be included in contracts by regulations will be read into contracts even if they are not actually incorporated. The impact of this legal doctrine is still being debated and may be limited to contract clauses implementing statutory requirements imposed by Congress and by important procurement policies of long-standing or it may extend to other regulations which are arguably of benefit to a Contractor as well as the Federal Government.[8]

Cost Principles

In private contracts the parties are free to bargain to determine the price of the goods or services. This is not true, however, in Government research contracts. Though the Government exercises control over the cost element in all areas of procurement, its control over the costs budgeted under its research contracts is almost complete. The section on research grants includes a discussion of FMC 73-8, **Cost Principles for Educational Institutions.**[9] This same circular controls the determinations of the costs which are allowable under research contracts, and the same finance-related concerns which were detailed in the discussion of grants apply with equal force to contracts. Under both, because the research is conducted by nonprofit institutions, a primary concern of college and university administrators should be the full and equitable reimbursement of research costs.

Except for contract awards by some agencies which result from unsolicited proposals, there do not appear to be any legislative requirements for cost-sharing on research contracts — which may render them more attractive than grants. However, there is nothing to prevent an agency from adopting the position that cost-sharing is to be encouraged, and the presence of a cost-sharing agreement could play a role in determining which of otherwise equally meritorious research proposals will be funded.

Agency Doctrines

The Government contract characteristics described above center on the unequal bargaining power of the parties involved. To a large extent this power differential stems from the sovereign nature of the Government. There is, however, a still greater and more direct effect of the Government's sovereignty which further distinguishes Government from private contracts. It is a limitation upon the set of legal doctrines called ''agency'', application of which is of the greatest concern during the administration of a contract.

In private contracts the agent of the principal may, under certain circumstances, exceed his real authority in entering into a contract, and yet that contract will still be binding on his principal. In the realm of federal contract law, however, the power of an agent to bind his principal, the Federal Government, is much more circumscribed. The basic rule is that an individual can only commit the Government to acts and relationships in accordance with the express powers granted to him by the agency. An invividual who is not expressly authorized to enter into contracts cannot make a contract which is enforceable against the Government. An individual who is authorized to enter into contracts binding the Government cannot commit the Government to clauses which vary from those established by the regulations unless the regulations specifically permit such deviations. In a similar manner, one who is otherwise authorized to act for the Government cannot bind the Government by acting in a manner other than as predetermined by the regulations.

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[7] G.L. Christian and Assoc. v. U.S., 312 F. 2d 418, cert. denied, 375 U.S. 954, 84 S. Ct. 444, 11 L. Ed2d 314 (1963).

[8] Braude, Herman M., and Lane, John Jr., ''Modern Insights on Validity and Force and Effect of Procurement Regulations — A New Slant on the Christian Doctrine,'' 31 Federal Bar Journal 99 (1972).

[9] This circular and its predecessor OMB A-21 are the same as the regulations governing this area: ASPR 15-3 and FPR 1-15.3

It is easier to understand the application of this concept if one regards the regulations as laws. Actions at variance with these laws would be illegal and therefore have no legal effect. The importance of this principle in research contracts cannot be overstated. Indeed, every institution contracting with the Government takes the risk in each interaction affecting performance under the contract that the person purporting to act on behalf of the Government is not functioning within the bounds of his express authority.

Authority of Government Representatives

A Contractor's concern on the subject of authority focuses on the Contracting Officer, the individual appointed by the agency to enter into contracts and to whom the contract clauses principally refer. Normally, the Contracting Officer's authority may not be delegated. However, he may operate through a duly designated representative, in which case the Contractor should be informed of the scope of the representative's authority. It should be apparent then that the Contractor must protect himself by knowing the lines and parameters of authority which apply to the administration of any particular contract. The problems inherent in ascertaining the authority of the persons with whom one deals should be obvious. However, the acquisition of such knowledge requires only the exercise of common sense and some degree of tact, in addition to a healthy respect for the potential consequences.

The related problems of determining the proper authority of a Government official and the proper exercise of that authority arise in the administration of a contract. These themes will consistently appear in the discussion of particular types of clauses which follow. Four have been selected because of their potential impact upon the conduct of research under Government contracts and because of their variance from the clauses included in private contracts.

1. **Changes**[10]

One of these clauses governs changes in the contract; it reserves for the Government the power to make unilateral decisions as to changes in the performance required under the contract. To be effective, any change must be within the scope of the work of the contract and must be in written form, i.e. a change order signed by the Contracting Officer. Proper use of the clause may result in an adjustment of the contract price if it is necessary.

Thus far the impact of the changes clause seems clear. However, there are distinct problems. In a literal sense, no ''change'' occurs without the written order of the Contracting Officer. Contract price adjustment can therefor be denied if a Contracting Officer refuses to issue a change order to cover changes which have in fact occurred.[11] This must be qualified, because some ''changes'' may be given effect even though no change order is issued. Examples are orders to accelerate work, inspection processes which interfere with performance, and instances where the Contractor's duties under the contract are increased or decreased by the Contracting Officer.[12]

An additional problem arises in looking specifically at research contracts. In order for a change to be proper it must be within the scope of the contract work. In many instances, particularly in basic research, the contract statement of work is decidedly broad and imprecise. Because the changes clause is best suited to contracts which require conformity with drawings, designs or specifications, a change order affecting research conduct could arguably be a change in the scope of the contract itself and therefore invalid. More precisely, where the course of research is not specifically stated, but the subject and goals are, the only material in which a change can be made is the scope of the work — the research. This analysis would seem to indicate that the changes clause should not be viewed as empowering the Government to exercise such technical direction over the conduct of research that it infringes upon the rights and interests of the institution. Moreover, one should also examine this issue for its reality. It is unlikely that an agency would procure a research project and then, after the research has started, alter its desired approach without consultation and agreement with the researcher.

It is more likely that a Government technical representative would suggest to the research investigator that a portion of the research be accomplished in a manner different from that initially intended, or that additional steps or work be undertaken. The researcher may agree or feel that the work is required. If the additional work will not alter the conduct of the research or increase the reimbursable costs there would not appear to be any objections to doing the suggested work. However, if the suggestion does entail either a change in research conduct or cost, or both, a change order should be sought from the Contracting Officer even though the researcher may be receptive to the suggestion. Without such a change order, the Contracting Officer may deny reimbursement for the extra costs incurred and require performance in accordance with the original terms of the contract. Of course, the proper approach in any situation will be determined to a large extent by the relative freedom of action granted the researcher under the contract and, to a limited extent, by the relationship established among the researcher, the institution, and the agency.

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[10] In some agencies this is an optional clause and may be negotiated — modified or deleted entirely.

[11] Plumley v. U.S., 226 U.S. 545 (1913).

[12] Specter, Louis, ''An Analysis of the Standard 'Changes' Clause,'' 25 Federal Bar Journal 177 (1965).

2. Termination

While the changes clause constitutes a substantial deviation from the normal pattern of private contracts, the termination clause represents an even greater one. If a party to a private contract were to decide that contract performance is no longer in his best interest and repudiate the contract, the other party would have grounds upon which to seek damages. There probably are few instances in which a private party would bargain away this right. In Government contracts, however, there is simply no opportunity to bargain it away. The Government always retains the right to repudiate the contract through a clause labeled ''Termination for the Convenience of the Government.'' Though the Contractor will receive some compensation in such cases, the effect is that the Government can terminate a contract when such is believed to be in its best interest.

As long ago as 1875 the U.S. Supreme Court upheld the right of the Government to terminate a contract and negotiate a valid settlement even in the absence of an express termination clause.[13] The justification for this clause lies in the sovereign nature of the Government and its stewardship of public funds. The Government seeks to insure that tax revenues are expended as efficiently as possible. For example, projects begun in time of war may no longer be necessary in time of peace and projects related to crises or special needs may no longer be necessary when such circumstances have passed. The exercise of this clause in a research context is not frequent, but it is a possibility of which an institution should be aware.

3. Audit

The same interest in efficient use of public monies gives rise to the audit clauses. Every contract provides for audit by the cognizant Government audit agency. In addition the Comptroller General of the United States, or his representative, is given the right in all negotiated contracts to inspect the financial records of the Contractor (and related Subcontractors) during the period of the contract and for three years after final payment.[14] The purpose is to provide the Government with an opportunity to determine the validity of the price it has paid for contract performance.

Government attention on this subject has been focused also on defense procurement contracts where substantial cost overruns have been experienced. The Truth in Negotiations Act[15] was passed in an effort to discourage the use of inaccurate or incomplete cost data in proposals. Research contracts with educational institutions are normally of the cost-reimbursement type and the costs are regulated by the cost principles previously discussed. The contract clause implementing the Truth in Negotiations Act empowers the Government to recover funds given to institutions as reimbursement for research costs which, after examination of the financial records, are determined not to be allowable.

4. Disputes

Just as it would be very unusual for one party to a private contract to open his books to inspection by the other, it would be rare to see one party agree that conflicts arising under the contract will be decided by the other party with only limited recourse to the judicial system. However, this is the case in Government contracts. Indeed, the development of the disputes clause is a particularly clear illustration of the legal powers attendant to sovereignty. As a general principle, the sovereign is immune from suits unless it gives a specific consent to be sued. The Federal Government has consented to be sued on contract claims,[16] but the procurement regulations require Contractors to initially pursue resolution of disputes through an administrative procedure which considers questions of both law and fact. In 1950 the U.S. Supreme Court held that the disputes clause then in use could validly provide that determinations by Government officials on issues of both fact and law would be final.[17] Soon afterward, the Court limited judicial review of final fact determinations to a test of whether the decision was founded on fraud, with fraud defined as ''conscious wrongdoing, an intention to cheat or be dishonest.''[18] The system sanctioned by these decisions was so restrictive that Congress was forced to legislate a more even-handed system which established the present basic rules governing disputes under Government contracts.[19]

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[13] Dounis, Peter L. and Forman, Leon Frederick W., ''Historical Significance of Termination of Contracts for the Convenience of the Government'' 14 Federal Bar Journal 19 (1954). See also U.S. v. Corliss Steamengine Co., 91 U.S.C. 321 (1875), Gantt, Paul H. and Cohen, James A., ''Terminations in Federal Government Contracts.'' 7 William and Mary Law Review 225 (1966).

[14] 10 U.S.C. § 2313(b) (1970) and 41 U.S.C. § 254 (1970).

[15] P.L. 87-653, 10 U.S.C. § 2306(5) (1970).

[16] 28 U.S.C. §§ 1491 (1964).

[17] U.S. v. Moorman 338 U.S. 457 (1950).

[18] Wunderlich v. U.S. 342 U.S. 98 at 100 (1951).

The procedure and decision standards established by the Wunderlich Act and incorporated by the modern disputes clause, have been approached by U.S. Supreme Court decisions as establishing an exclusive and complete administrative system for the resolution of disputes. Under this system the Contracting Officer's ''disputes'' decisions may be appealed to a Board of Contract Appeals. The Board's decision on a question of fact is given a presumption of finality which may be overruled by a court of competent jurisdiction if, though not fraudulently motivated, it was capricious, arbitrary, or so erroneous as to imply bad faith, or simply not supported by substantial evidence. The Contracting Officer's decision on a question of law and the Board's decision on a legal issue are never final or endowed with a presumption of validity.

The goal of this system is the resolution of all conflicts in a manner that is fair to both the Government and the Contractor. However, just as in private contracts, one does not enter into the relationship anticipating conflict and, though the system may work successfully, the best advice is to avoid ever being placed in a ''disputes'' situation.

An Administrative System

This presentation of research procurement by contract has had a recurrent theme: That contracts with the Federal Government differ in important ways from private contracts. Government contracts do not result from free bargaining of the parties. Government contract law, the procedures and the contracts themselves present a complete and distinct system by which Government procurement is administered. One who contracts with the Government chooses to become involved with this administrative system. In this sense a Government contract is not a contract, but a certificate of entry into a predetermined matrix of rights and duties within which a task is to be accomplished. Increasing use of the contract, the evolution of the grant, and the clearer rights and duties expressed by federal contract law make it imperative that research administrators and investigators become familiar with this administrative system.

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[19] 41 U.S.C. §§ 321, 322 (1970). See also Joy, James V.,''The Disputes Clause in Government Contracts; A Survey of Court and Administrative Decisions'' 25 Fordham Law Review 11 (1956); Roberts, James M., ''Government Contracts: Disputes Clauses and the Wunderlich Act'' 17 Wyoming Law Journal 73 (1962).

GRANTS-CONTRACTS

Similarities — Differences

The comparison of the legal and administrative requirements of federal research grants and contracts which appears in the following chart is not presented as a statement of analytical findings. Its purpose is to provide a broad view of the relationship between Government agencies and the performing institution which is created by these research agreements.

Topic	Grant	Contract
Legal Character of Agreement	Same	
Statutory Clauses	Occasionally Used	Required
Agreement Arrived At By	Application and Notice of Award	Negotiation under Procurement Regs.
Agreement Effective On	Notice of Award	Signature by Contracting Officer
Governing Regulations	Agency Policy Statements	Federal Law and Regulation and Agency Regs.
Cost Principles	Same	
Authority to Rebudget	Generally liberal	Generally liberal-except on certain costs e.g. purchase of equipment
Audit of Records	Same	
Cost Sharing	Required	Generally not Required (Some agencies require cost-sharing on awards based upon unsolicited proposals)

Topic	Grant	Contract
Institution Responsibility For Funds	Same	
Rights in Data	Same	
Patent Rights	Generally more liberal-Some agencies have Institutional Agreements	As provided by terms of contract
Copyright	Same	
Freedom of P.I. in Research	Broad	More circumscribed
Right of Government to Terminate	Slight restrictions	Total
Freedom to Publish	Same	
Resolution of Disputes	Few established procedures	Specified procedure
Imposition of Agency Concepts by Technical Rep.	Not clearly communicated	Clearly restricted
Omitted Clauses	Not Applicable	Read in If Required by Law or Reg.
Competition for Award	Scientific Merit	Scientific Merit and Price
Clarity of Rights and Duties	Often unclear	Clearly established

CONTRACT CLAUSE ANALYSES

The clauses presented in this Section were chosen because of the frequency with which they occur in Government research contracts with educational institutions. They are drawn from several sources; Section 7, Part 4 of the Armed Services Procurement Regulation (clauses for cost-reimbursement type research and development content); Subpart 1-7.2 of the Federal Procurement Regulations (Cost Reimbursement Type Supply Contracts); from HEW-315 (Rev. 12/72) (General Provisions), and selected contracts with other Government agencies. The ASPR and FPR clauses were drawn from the Commerce Clearing House's **Government Contracts Reporter** as of January 31, 1975. The HEW clauses are from the December, 1972 revision of Form 315.

The clauses fall into three categories: (1) required clauses, (2) those to be used when appropriate and, (3) additional clauses. The research administrator may not encounter some of these clauses in the course of his work. However, since all are authorized or required to be used in research contracts, they have been analyzed in this chapter to be used when necessary.

The format consists of a reproduction of the clause followed immediately by its analysis.

In this section there often occur clauses which have substantially the same title or which appear to deal with the same subject in the same way. Where two analyses are made of clauses having the same or similar titles, it was done because the clauses differ in significant provisions. Where similar clauses contained insignificant variations they are grouped in a single analysis which then indicates those variations which are noteworthy and required mention. An effort was made to restrict the information presented in the analyses to that which is required for a clear understanding of the clauses while avoiding the danger of obscuring that understanding through unnecessary detail.

The clauses are presented in operational groupings in the hope of answering most of the questions which arise concerning each different facet of a research and development contract. Clauses which implement Statutory or Executive Order requirements are not subject to negotiation between the Government agency and the educational institution. However, clauses which implement agency policy may be subject to amendment or deletion provided the institution has a bona fide reason. For example, the clause Insurance — Liability to Third Persons may be revised for state universities which are forbidden by state law to purchase insurance. Also, if a contract clause based on agency policy conflicts with the research policy of an institution the Government Contracting Officer will generally agree to amend the proposed contract to resolve such conflict.

The administrator should be alert to special elements which some clauses have in common.

I. WITHHOLDING PAYMENT

The following clauses empower the Government to **withhold payment** from the Contractor. Note, however, that the Limitation on Withholding of Payments Clause (#D-11) restricts the Government to a choice of one clause to determine the maximum amount which may be withheld where more than one clause providing for withholding appears in the contract. The clauses **permitting** withholding are:

Clauses for Contracts Involving Construction Work (ASPR/FPR B-2)
Contract Work Hours and Safety Standards Act — Overtime Compensation (ASPR/FPR E-2)
Contract Work Hours Standards Act — Overtime Compensation (HEW E-3)
Limitation on Withholding of Payments (ASPR D-11)
Patent Rights (HEW K-5)
Patent Rights — Title — License — Deferred (ASPR K-8)
Rights in Technical Data (ASPR K-10)

II. PRIOR APPROVAL BY A GOVERNMENT OFFICIAL

Certain clauses require prior approval by a Government official, usually the Contracting Officer and normally in writing, before the contracting institution may take specific actions. The following clauses contain this requirement:

Allowable Cost and Payment (ASPR/FPR D-3)
Assignment of Claims (ASPR/HEW/FPR E-2)
Clauses for Contracts Involving Construction Work (ASPR/FPR B-2)
Foreign Travel (HEW D-8)
Insurance — Liability to Third Persons (ASPR/FPR 1-7)
Key Personnel (HEW B-5)
Litigation and Claims (HEW D-12)
Negotiated Overhead Rates (ASPR/FPR/HEW D-13)
Payment of Overtime Premiums (ASPR/FPR D-16)
Property Rights in Inventions (NASA K-7)
Questionnaires and Surveys (HEW B-12)
Required Insurance (HEW I-9)
Restrictions on Printing (ASPR B-14)
Services of Consultants (HEW D-22)
Subcontracting (HEW H-5)
Subcontracts (ASPR/FPR H-6)

See Also:

Allowable Cost (for Rebudgeting) (HEW D-2)
Limitation of Cost (Certain C.O. Approval) (ASPR/FPR/HEW D-10)

III. NOTICE TO THE GOVERNMENT

Several clauses require the Contractor to give notice to the Government of certain occurrences, facts or circumstances. This requirement is different both from that of prior approval and the requirements for reports which do not result in Government activity. The notice requirement occurs in these clauses:

Assignment of Claims (ASPR/HEW/FPR E-2)
Care of Laboratory Animals (ASPR/HEW/FPR B-1)
Changes (HEW C-2)
Changes (ASPR/FPR C-3)
Disputes (ASPR/FPR/HEW L-1)
Duty-Free Entry (ASPR J-2)
Duty-Free Entry of Canadian Supplies (ASPR J-3)
Employment of the Handicapped (HEW I-4)
Excusable Delays (ASPR/FPR B-3)
Filing of Patent Applications (ASPR/NASA K-3)
Government Property (HEW J-5)
Government Property (ASPR/FPR J-6)
Insurance — Liability to Third Persons (ASPR/FPR I-7)
Key Personnel (HEW B-5)
Limitation of Cost (ASPR/FPR/HEW D-10)
Litigation and Claims (HEW D-12)
Military Security Requirements (ASPR B-6)
Notice and Assistance Regarding Patent and Copyright Infringement (HEW/ASPR/FPR/NASA K-4)
Notice to the Government of Delays (HEW B-8)
Notice to the Government of Labor Disputes (ASPR/FPR B-7)
Patent Rights (ASPR K-8)
Patent Rights (HEW K-5)
Patents (AEC K-6)
Price Reduction for Defective Cost or Pricing Data (ASPR/FPR D-17)
Property Rights in Inventions (NASA K-7)
Publication and Publicity (HEW G-2)
Subcontracting (HEW H-5)
Subcontracts (ASPR/FPR H-6)
Stop Work Order (ASPR C-4)
Reporting of Royalties (HEW D-20)
Reporting of Royalties (Foreign) (ASPR D-21)
Termination for Convenience of the Government (ASPR/HEW/NASA/FPR M-1)

IV. SUBCONTRACTS

The largest group of these **special interest clauses is made up of those which MUST appear in subcontracts.** In many instances the requirement that the clauses flowdown is dependent on certain characteristics of the Subcontractor or subcontract. The most common factor is the value of the subcontract. The research administrator and investigator may come into contact with these clauses both through letting contracts and in accepting subcontracts:

Accounts, Audit and Records (HEW D-1)
Acknowledgement of Sponsorship (AF-ASPR-SUP G-1)
Advance Payments (ASPR/FPR E-1)
Audit by the Department of Defense (ASPR D-4)
Clauses for Contracts Involving Construction Work (ASPR/FPR B-2)
Contract Work Hours and Safety Standards Act — Overtime Compensation (ASPR/FPR E-1)
Contract Work Hours Standards Act — Overtime Compensation (HEW E-2)
Cost Accounting Standards (ASPR D-5)
Duty-Free Entry (ASPR J-2)
Duty-Free Entry of Listed Canadian Supplies (ASPR J-3)
Employment of the Handicapped (HEW I-4)
Equal Opportunity (ASPR/HEW/FPR I-5)
Examination of Records (ASPR/HEW/FPR D-6)
Excess Profit (ASPR D-7)
Filing of Patent Applications (ASPR/NASA K-3)
Inspection (ASPR F-2)
Labor Surplus Area Subcontracting Program (ASPR/FPR H-2)
Listing of Employment Openings (ASPR/HEW/FPR I-8)
Military Security Requirements (ASPR B-6)
Minority Business Enterprises Subcontracting Program (ASPR/FPR H-3)
Notice and Assistance Regarding Patent and Copyright Infringement (HEW/ASPR/FPR/NASA K-4)
Notice to the Government of Labor Disputes (ASPR/FPR B-7)
Patent Rights (ASPR/FPR K-8)
Patent Rights (HEW K-5)
Patents (AEC K-6)
Preference for U.S. Flag Carriers (ASPR/FPR B-9)
Property Rights in Inventions (NASA K-7)
Renegotiation (ASPR D-19)
Reporting of Royalties (ASPR D-20)
Rights in Data (HEW K-9)
Rights in Technical Data (ASPR K-10)
Small Business Subcontracting Program (ASPR/FPR H-4)
Subcontractor Cost or Pricing Data (ASPR/FPR D-23)
Use of Government Facilities on a No-Charge Basis (AF-ASPR J-8)

See also:

- Government Property (HEW J-5)
- Government Property (Cost Reimbursement, Nonprofit) (ASPR/FPR J-6)

The format selected for Part II provides:

1) A side by side location for each clause and it's analysis and
2) Space for the user to enter his institution's own policy and procedure when deemed appropriate.

SECTION A
CLAUSES AFFECTING CONTRACT VALIDITY AND CONSTRUCTION

A-1 APPROVAL OF CONTRACT

ASPR — Approval of Contract (1949 July)

This contract shall be subject to the written approval of or his duly authorized representative and shall not be binding until approved.

A-2 ASPR 7-103.20 COVENANT AGAINST CONTINGENT FEES (1958 JAN)

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

APPROVAL OF CONTRACT

Reference

ASPR 7-404.3 incorporates 7-105.2 (1949 JUL)
FPR 1-7.204-2

Source of Clause

Regulation

Purpose of Clause

To specify the person or persons whose approval is necessary to bind the Government to a contract.

Comment

It is Government policy to minimize the number of signatures required to approve Government contracts. However, where multiple approval signatures are required, they are obtained concurrently, if possible.

Specifying exactly whose **written** approval is necessary to bind the Government to the contract eliminates possible confusion over the validity of the contract.

Flow Down

Not required. Note, however, the role of the Contracting Officer in approving subcontracts for which advance notice is required (see ASPR 7-402.8, and FPR §1-7.202-8)

Special Notes

This clause is inserted in contracts when, because of special circumstances or program requirements, a Government official other than the Contracting Officer and usually at a higher level is the only official authorized to enter into the contract on behalf of the Government.

COVENANT AGAINST CONTINGENT FEES

References

ASPR 7.402-19 incorporates 7.103-20 (1958 JAN)
FPR 1-7.202-20 incorporates 1-1.503.
HEW-315 (Rev. 12/72)

Source of Clause

ASPR — Regulation required by Armed Service Procurement Act, 10, U.S.C. § 2306(b), 62 STAT § 23 (1948); and Executive Order 10210, 2 February 1951, 16 F.R. 1049.

FPR, HEW —Regulation required by Federal Property and Administrative Services Act, 41 U.S.C § 254(a), 63 STAT § 395 (1949).

Purpose of Clause

To prevent the use of improper influence in obtaining Government contracts. To protect the Government from directly paying for inequitable and exorbitant contingent fees.

Comment

1. **Definitions**
   - a. **Contigent Fee** — Any fee part or all of which is paid **only if** the Contractor gets the contract.
   - b. **Improper Influence** — Any direct or indirect influence which induces or tends to induce Government consideration or action on a contract **for any reason other than merit.**
2. **Representation from prospective Contractors**

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Each **prospective** Contractor must provide

a. a written statement as to whether it has employed or retained any company or person (other than a full-time employee) to solicit or secure the contract.

b. information detailing (if applicable)

  i. its relationship to such company or person, including information concerning

    a. the type of relationship, and

    b. the length of time the relationship has existed.

  ii. any contract with such company or person, including the method of payment used.

3. **Warranty from actual Contractors**

The Contractor warrants that no person or selling agency has been retained to solicit or secure the contract under an agreement or understanding for

a. a commission,

b. a percentage,

c. a brokerage or contingent fee, or

d. any other payment qualifying as a contingent fee.

4. **Breach of the warranty**

If the Contractor is discovered to have breached his warranty, **then** the Government is entitled to take any or all of the following actions:

a. **If** the Contractor's offer has not yet been accepted, **then** the Government may reject the offer

b. **If** the contract has already been awarded, **then** the Government may

  i. nullify the contract without any liability on its part

  ii. deduct from the contract price or consideration the amount of any contingent fee, or

  iii. otherwise recover the fee.

c. whether or not a contract has been awarded, the Government may

  i. debar the Contractor, or

  ii. refer the case to the Department of Justice for possible criminal prosecution.

5. **Exception for the Contractor's use of bona fide employees and bona fide established commercial or selling agencies.**

a. **A bona fide employee** is any person

  i. employed by the Contractor in good faith to devote his full time to the Contractor,

  ii. over whom the Contractor has the right to exercise supervision and control as to time, place, and manner or performance of work.

  iii. Whose hiring

    a. contemplates some continuity

    b. is **not** related only to obtaining one or more specific Government contracts, **and**

  iv. whose salary is determined according to the customs of the trade regardless of whether it's on

    a. a fixed basis, or

    b. a percentage, commission, or contingent basis, or

    c. any combination of the above.

b. **Bona fide established commercial or selling agency** maintained by the Contractor.

There is no hard-and-fast rule for determining whether an agency is a ''bona fide'' agency, however, following factors all favor the finding that an agency is ''bona fide.''

  i. The fees charged for services rendered are reasonable rather than exorbitant;

  ii. the agency has enough knowledge of the services to be rendered and the qualifications of the Contractor to represent its ability on the merits;

  iii. there is a continuing relationship, past or contemplated, between the Contractor and the agency;

  iv. there is a broad rather than narrow scope to the relationship; i.e. that the agency attempts to secure all sorts of business for the Contractor, rather than just Government contracts (even though concentration solely on such contracts is no disqualification in itself);

  v. the agency is an established or ongoing concern likely to continue operations in the future.

c. **Nature of the exception**

For the purpose of securing Government contracts, the Contractor may pay a contingent fee to

  i. a bona fide employee, or

  ii. a bona fide established commercial or selling agency maintained by the Contractor.

A-2

A-3 GRATUITIES (1952 MAR)

(a) The Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such contract; **provided,** that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

Flow Down A-2

Not required.

Special Note

The prohibition against contingent fees extends to payments for ''information'' which may lead to obtaining a Government contract, unless the agent being paid for such information is a bona fide established commercial or selling agency.

GRATUITIES

A-3

Reference

ASPR 7-403.11 incorporates 7-104.16 (1952 MAR)

Source of Clause

Statute, 10 U.S.C §2207 (1970) (76 Stat. §520)

Purpose of Clause

To discourage a Contractor from using improper influence during contract award and administration.

Comment

1. **Contract Termination**

   A Contractor may have his contract terminated by the Government **if**

   a. This clause is in the contract, **and**

   b. He or his agent offers or gives a gratuity (entertainment, gifts, etc.) to any officer or employee of the Government **and**

   c. He **intends** to use such an offer or gift to gain gavorable favorable treatment in the
      i. awarding of, or
      ii. amending of, or
      iii. making any determination with respect to the contract (such intent may be inferred)

2. Procedure for Termination

   When the Government acts to terminate the contract under this clause, the Contractor

   a. must receive notice and a hearing — usually under the Gratuities Clause Hearings Procedure (detailed in Appendix D of the ASPR).

   b. must receive written notice of the termination.

   c. **may** get a **direct court review of the facts in issue.**

3. Other Governmental Remedies

   After terminating the contract **under this clause,** the Government may also

   a. proceed as when a breach of contract has occurred, and/or

   b. impose a penalty, as exemplary damages, of not less than 3 nor more than 10 times the cost to the Contractor of providing the gratuity (whether it was accepted or not), and/or

   c. debar the Contractor from contracting with the Department of Defense for a reasonable specified period of time (usually 3 years or less) if the violation is shown by clear and convincing evidence, and/or

   d. pursue any other remedies provided by law or contract.

Flow Down

Not required.

Special Notes

1. No Government employee may solicit or accept a gratuity from a Contractor (Executive Order 11222,

A-3

A-4 OFFICIALS NOT TO BENEFIT (1949 JUL)

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

A-5 ORDER OF PRECEDENCE (1973 APR)

In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the schedule (excluding the Specifications); (b) terms and conditions of the solicitation, if any; (c) general provisions; (d) other provisions of the contract, when attached or incorporated by reference; and (e) the specifications.

prescribing standards of ethical conduct for Government officers and employees, §201 8 May 1965, 30 CFR §6469). **A-3**

2. If the Government cannot prove a gratuities clause violation, it may still terminate the contract under the ''Terminations'' clause. However, it may do no more than that.

OFFICIALS NOT TO BENEFIT **A-4**

References

ASPR 7.402-18 incorporates 7.103-19 (1949 JUL)
FPR §1-7.202-19 incorporates §1-7.102-17
HEW-315 (Rev. 12/72)

Source of Clause

Regulation required by 41 U.S.C. §22 (1970), implementing 18 U.S.C. §433 (1948)

Purpose of Clause

To prevent improper influence in the awarding of Government contracts.

Comment

1. General Prohibition

   No member of or delegate to Congress or resident commissioner may

   a. Share in any part of the contract.
   b. Share in any benefit arising from the contract.

2. Exception

   The prohibition does not apply to a contract made with a corporation for its general benefit. Hence, it probably will not be applicable to educational institutions.

Flow Down

Not required. The statute does not apply to subcontracts.

Special Notes

Any contract entered into in violation of this clause shall, by operation of law, be void and any money advanced by the Government pursuant to such contracts shall be repaid upon demand by the Contracting Officer. 18 U.S.C. §431 (1948).

ORDER OF PRECEDENCE **A-5**

Reference

ASPR 7-403.35 incorporates 7-2003.4' (1973 APR)

Source of Clause

Regulation

Purpose of Clause

To specify which contract provisions shall prevail if there is an inconsistency in the contract.

Comment

1. **Contract Format**

a. Most negotiated contracts have a uniform format
   - i. Part I — General Instructions
   - ii. Part II -- The Schedule
   - iii. Part III — General Provisions
   - iv. Part IV — List of Documents

b. In addition, the clauses required by the ASPR may be **incorporated** into the contract **by reference** to the ASPR paragraph number, clause title, and date of clause **IF**
   - i. the clause does not contain blanks to be filled
   - ii. the clause is not modified
   - iii. the clause is not prohibited from such incorporation. ASPR 7-001.

2. **The Schedule** usually contains
   - a. a description of required services and/or a list of required data
   - b. any specifications for such services or data
   - c. requirements for delivery or performance
   - d. inspection and acceptance requirements
   - e. contract administration data
   - f. other special provisions.
3. **General Provisions** are
   - a. the contract clauses required by law or regulation
   - b. additional contract clauses applicable to the procurement
   - c. any appropriate alterations.
4. **Order of Preference**

Where there is a conflict between provisions in different parts of the contract it shall be resolved according to the order of precedence of the parts involved:

- a. 1st priority — the schedule (excluding the specifications)
- b. 2nd priority — general provisions
- c. 3rd priority — the other provisions of the contract, whether incorporated by reference or not
- d. last priority — the specifications.

Flow Down

Not required. The Contractor, however, may wish to insert a similar clause in his subcontracts so as to resolve inconsistencies more easily.

Special Notes

This clause is to be used in contracts not preceded by a written solicitation (such usually contains its own order of precedence clause).

It may be altered, by deleting items or changing their order, in order to meet the needs of a particular procurement.

SECTION B
CONDUCT OF WORK

B-1 CARE OF LABORATORY ANIMALS (1974 APR)

(a) Before undertaking performance of any contract involving the use of laboratory animals, the Contractor shall register with the Secretary of Agriculture of the United States in accordance with Section 6, P.L. 89-544, Laboratory Animal Welfare Act, 24 August 1966 as amended by P.L. 91-579, Animal Welfare Act of 1970, 24 December 1970. The Contractor shall furnish evidence of such registration to the Contracting Officer.

(b) The Contractor shall acquire animals used in research and development programs from a dealer licensed by the Secretary of Agriculture, or from exempted sources in accordance with the Public Laws enumerated in (a) above.

(c) In the care of any live animals used or intended for use in the performance of this contract, the Contractor shall adhere to the principles enunciated in the **Guide for Care and Use of Laboratory Animals** prepared by the Institute of Laboratory Animal Resources, National Academy of Sciences — National Research Council, and in the United States Department of Agriculture's regulations and standards issued under the Public Laws enumerated in (a) above. In case of conflict between standards, the higher standard shall be used. Contractor reports on portions of the contract in which animals were used shall contain a certificate stating that the animals were cared for in accordance with the principles enunciated in the **Guide for Care and Use of Laboratory Animals** prepared by the Institute of Laboratory Animal Resources, NAS-NRC, and/or in the regulations and standards as promulgated by the Agricultural Research Service, USDA, pursuant to the Laboratory Animal Welfare Act of 24 August 1966, as amended (P.L. 89-544 and P.L. 91-579).

NOTE: The Contractor may request registration of his facility and a current listing of licensed dealers from the Regional Office of the Animal and Plant Health Inspection Service (APHIS), USDA, for the region in which his research facility is located. The location of the appropriate APHIS Regional Office as well as information concerning this program may be obtained by contacting the Senior Staff Officer, Animal Care Staff, USDA/APHIS, Federal Center Building, Hyattsville, Maryland, 20782.

CARE OF LABORATORY ANIMALS

References

ASPR 7-403.39 incorporates 7-303.44 (1974 APR)
HEW — Unnumbered Special Provision (identical to ASPR clause)

5

Source of Clause

Regulation required by P.L. 89-544, Laboratory Animal Welfare Act, as amended by P.L. 91-579, Animal Welfare Act of 1970.

Purpose of Clause

To insure that all aspects of investigative programs involving the use of experimental or laboratory animals are humanely conducted.

Comment

1. This clause will be included in all contracts awarded which may involve the use of experimental or laboratory animals in the United States, its possessions, and Puerto Rico.
2. **Research prerequisites**

   Before starting performance of any contract involving the use of laboratory animals the Contractor must

   a. **Register** with the Secretary of Agriculture in accordance with Section 6, P.L. 89-544, Laboratory Animal Welfare Act, 24 August 1966, as amended by P.L. 91-579, Animal Welfare Act of 1970, 24 December 1970, and

   b. **Furnish** evidence of such registration to the Contracting Officer.
3. **Acquisition of Animals for Research**

   The Contractor shall acquire necessary animals from

   a. Dealers licensed by the Secretary of Agriculture or

   b. Sources exempted pursuant to the acts listed above.
4. **Use of Animals in Research**

   The Contractor shall care for animals used or intended for use in performance of the contract in accordance with the following standards, **the higher standard** to be followed where there is any conflict:

   a. **The Guide for Care and Use of Laboratory Animals** produced by the Institute of Laboratory Animal Resources, National Academy of Sciences-National Resource Council.

   b. United States Department of Agriculture Regulations and Standards published pursuant to the acts listed above.
5. **Post Research Certification**

   Reports by the Contractor on portions of contract performances employing animals must contain **a certificate** stating the animals were cared for in accordance with the principles enunciated in

   a. **The Guide for Care and Use of Laboratory Animals,** and/or

   b. The Regulations and Standards promulgated by the Agricultural Research Service, U.S.D.A., pursuant to the acts listed above.

Flow Down

Not required — However, the institution may wish to include a similar clause in all subcontracts which may involve laboratory animals.

Special Notes

1. The institution may request registration of its research facility and a current listing of licenced animal dealers from the Regional Office of the Animal and Plant Health Inspection Service, USDA, for its region.
2. Although no FPR ''Care of Laboratory Animals'' clause was found, Contractors should expect such to be in their FPR contracts because of The Laboratory Animal Welfare Act.

CLAUSES FOR CONTRACTS INVOLVING CONSTRUCTION WORK

References

ASPR 7-403.1 incorporates 7-602.23 in accordance with 18-703, 18-701, and 12-106; see also 7-603.26
FPR 1-7.203.1 incorporates 1-18.703-1 in accordance with 1-18.701

Sources of Clauses

Regulations, as required by 40 U.S.C. §§276(a) to (a) 7 (The Davis-Bacon Act); 40 U.S.C. §§327-333 (The Contract Work Hours and Safety Standards Act); 18 U.S.C. §874; 40 U.S.C. §276 (c) (The Copeland ''Anti-Kickback'' Act)

Purpose of Clauses

To prescribe labor standards for construction contracts and contracts involving construction.

A. GENERAL COMMENTS

1. **Definitions and Coverage**
   - a. **Construction** means construction, alteration, or repair of buildings, structures, or other real property.
   - b. **Mechanics and Laborers** are those workers, including working foremen, that perform manual or physical work or work with tools and equipment under a prime contract or subcontract at any tier (under the Contract Work Hours Standards Act, watchmen and guards are included).
   - c. **The Site of Work** is limited to
     1. The physical place or places where the construction called for in the contract will remain when work on it has been completed, and
     2. Adjacent or nearby property used by the Contractor or Subcontractor during the performance of the construction for the particular contract, and reasonably included in the ''site'' because of its proximity.
   - d. **Coverage**

     The Clauses for Contracts Involving Construction Work (Labor Standards Clauses) cover **only**
     1. The **construction** work
     2. Performed by **mechanics** and **laborers**
     3. At the **site of the work.**

2. **Applicability**
   - a. A contract for construction and non-construction work must include labor standards clauses if
     1. The contract contains requirements for ''substantial'' construction work.
     2. It is foreseeable at the date of the contract that a ''substantial'' amount of construction work will be necessary to perform the contract.

        NOTE: ''Substantial'' relates to the type and quantity of construction work to be performed (not merely to the total value of the construction work compared to the total value of the contract)
     3. The construction work is physically or functionally separate from, and can be performed independently of the other work required by the contract.
     4. The construction work is, or reasonably can be foreseen to be, performed at a **particular work site**, so that wage rates can be obtained for the locality.
     5. The contract is for construction work within the United States exceeding $2,000.
   - b. The Construction Labor Standard Clauses are not applicable to contracts
     1. That require construction in support of non-construction work in circumstances where the construction work is
        - a. So merged with the non-construction work, or
        - b. So fragmented in terms of work locations or time spans that it cannot be segregated.
     2. That require construction work that is
        - a. So closely related to research, experiment, and development work that it cannot be separated or
        - b. The subject of research, experiment, or development.
     3. That are for dismantling, demolition, or exploratory drilling.

DAVIS-BACON ACT (40 U.S.C. 276a to a-7) (1972 FEB)

(a) All mechanics and laborers employed or working directly upon the site of the work shall be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Regulations (29 CFR, Part 3)), the full amounts due at time of payment computed at wage rates not less than the aggregate of the basic hourly rates and the rates of payments, contributions, or costs for any fringe benefits contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to

3. **The Labor Standards Clauses**

   The clauses to be used in contracts involving construction work and discussed here as a group are the

   a. **Davis-Bacon Act Clause**
      References
         ASPR 7-602.23 (a) (i) (1972 FEB)
         FPR 1-18.703-1 (a)
   b. **Contract Work Hours and Safety Standards Act — Overtime Compensation Clause**
      References
         ASPR 7-602.23 (a) (ii) (1973 APR)
         FPR 1-18.703-1 (b)
   c. **Apprentices and Trainees Clause**
      References
         ASPR 7-602.23 (a) (iii) (1972 FEB)
         FPR 1-18.703-1 (c)
   d. **Payrolls and Basic Records Clause**
      References
         ASPR 7-602.23 (a) (iv) (1969 JUN)
         FPR 1-18.703-1 (d)
   e. **Compliance with Copeland Regulations Clause**
      References
         ASPR 7-602.23 (a) (v) (1964 JUN)
         FPR 1-18.703-1 (e)
   f. **Withholding of Funds**
      References
         ASPR 7-602.23 (a) (vi) (1972 FEB)
         FPR 1-18.703-1 (f)
   g. **Subcontracts**
      References
         ASPR 7-602.23 (a) (vii) (1972 FEB)
         FPR 1-18.703-1 (g)
   h. **Contract Termination-Debarment**
      References
         ASPR 7-602.23 (a) (viii) (1972 APR)
         FPR 1-18.703-1 (h)
   i. **Disputes Concerning Labor Standards**
      References
         ASPR 7-603.26 (1965 JAN)
         FPR 1-18.703-1 (i)

4. **Contracts with a State or its Political Subdivisions**

   IF

   a construction contract is with a state or one of its political subdivisions

   THEN

   all of the labor standards clauses must be prefaced by a provision requiring the Contractor to

   a. Comply with the requirements of the Contract Work Hours Standards Act, and
   b. Insert the Labor Standards Clauses in its subcontracts with private persons or firms.

   NOTE: State Universities, as agencies of the State, may find themselves bound by this extra provision

B. DAVIS-BACON ACT CLAUSE — COMMENT

1. **The Contractor's Basic Payment Obligations**

   The Contractor must pay all mechanics and laborers working directly on the site of the contract work at least **the prevailing wage,** as determined by the Secretary of Labor, for **each class** of mechanics and laborers working in similar work in the location in which the contract or subcontract is performed.

B-2 exist between the Contractor or Subcontractor and such laborers and mechanics. A copy of such wages determination decision shall be kept posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers.

(b) The Contractor may discharge his obligation under this clause to workers in any classification for which the wage determination decision contains:

(1) Only a basic hourly rate of pay by making payment at not less than such basic hourly rate, except as otherwise provided in the Copeland Regulations (29 CFR, Part 3); or

(2) Both a basic hourly rate of pay and fringe benefits payments, by making payment in cash, by irrevocably making contributions pursuant to a fund, plan, or program for, and/or by assuming an enforceable commitment to bear the cost of, bona fide fringe benefits contemplated by the Davis-Bacon Act, or by any combination thereof. Contributions made, or costs assumed, on other than a weekly basis shall be considered as having been constructively made or assumed, during a weekly period to the extent that they apply to such period. Where a fringe benefit is expressed in a wage determination in any manner other than as an hourly rate and the Contractor pays a cash equivalent or provides an alternative fringe benefit, he shall furnish information with his payrolls showing how he determined that the cost incurred to make the cash payment or to provide the alternative fringe benefit is equal to the cost of the wage determination fringe benefit. In any case where the Contractor provides a fringe benefit different from any contained in the wage determination, he shall similarly show how he arrived at the hourly rate shown therefor. In the event of disagreement between or among the interested parties as to an equivalent of any fringe benefit, the Contracting Officer shall submit the question, together with his recommendation, to the Secretary of Labor for final determination.

(c) The assumption of an enforceable commitment to bear the cost of fringe benefits, or the provision of any fringe benefits not expressly listed in section 1(b)(2) of the Davis-Bacon Act or in the wage determination decision forming a part of the contract, may be considered as payment of wages only with the approval of the Secretary of Labor pursuant to a written request by the Contractor. The Secretary of Labor may require the Contractor to set aside assets, in a separate account, to meet his obligations under any unfunded plan or program.

(d) The Contracting Officer shall require that any class of laborers or mechanics, including apprentices and trainees, which is not listed in the wage determination decision and which is to be employed under the contract shall be classified or reclassified conformably to the wage determination decision and shall report the action taken to the Secretary of Labor. If the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers or mechanics, including apprentices and trainees, to be used, the Contracting Officer shall submit the question, together with his recommendation, to the Secretary of Labor for final determination.

(e) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any Subcontractor directly on the site of the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, the Contracting Officer may (i) by written notice to the Government Prime Contractor terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (ii) prosecute the work to completion by contract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(f) Paragraphs (a) through (e) of the clause shall apply to this contract to the extent that it is (i) a prime contract with the Government subject to the Davis-Bacon Act or (ii) a subcontract also subject to the Davis-Bacon Act under such prime contract.

a. **Method of Payment**

The Contractor must pay the various classes of mechanics and laborers

1. On an unconditional basis
2. Not less than once a week, and
3. Without subsequent deduction or rebate of any kind, **except for** payroll deductions (e.g. Federal or State income, and Social Security Taxes) authorized by the Copeland Regulations (see 29 C.F.R., Part 3 and Part **F** of the construction work clauses)

b. **The Prevailing Wage**

1. **The full amount due** each class of mechanics and laborers shall consist of

    a. Wages computed at the basic hourly rate of pay, and

    b. Such fringe benefits as are required by the wage determination decision (**which is to be attached to the contract**) of the Secretary of Labor.

    NOTE: Fringe benefits on other than a weekly basis will be treated as constructively made during the period to which they apply.

2. **Employee Notice of the Prevailing Wage**

    The wage determination decision of the Secretary of Labor must be posted

    a. At the site of the construction work, and

    b. In a prominant place easily seen by the workers.

3. **Priority of Wage Determination Decision**

    Laborers and mechanics must be paid according to the wage-determination decision, regardless of any contract which exists between Contractors and Subcontractors and such laborers and mechanics.

2. **Fulfilling the Contractor's Payment Obligation**

a. **Basic Hour Rate of Pay Only**

If the wage determination decision contains **only a basic hourly rate of pay, then** the Contractor must make payment at a rate no less than such basic hourly rate, except that payroll deductions may be withheld in accordance with the Copeland Regulations.

b. **Basic Hour Rate Plus Fringe Benefits**

If the wage determination decision contains **both** a basic hourly rate of pay **and** fringe benefit payments, **then** the Contractor must

1. Make payment in cash.
2. Make an **irrevocable contribution** pursuant to a fund, plan or program for bona fide fringe benefits, and/or assume an **enforcible commitment** to bear the cost of such bona fide benefits as **are contemplated** by the Davis-Bacon Act, **or**
   are contemplated by the Davis-Bacon Act, **or**
3. Assume an **enforceable commitment** to bear the cost of fringe benefits **not expressly** listed by the Davis-Bacon Act or in the Wage Determination Decision and/or provide such fringe benefits
   But only if

    a. The Contractor makes a written request to the Secretary of Labor, and

    b. The Secretary of Labor gives **written** approval allowing such benefits to be considered as payment of wages.

NOTE: The Secretary of Labor may require the Contractor to set aside assets in order to meet its obligations under any unfunded plan of program.

3. **Fringe Benefits**

a. The benefits contemplated by the Davis-Bacon Act include

1. Medical or hospital care
2. Pensions on retirement or death
3. Compensation for occupational injuries or illnesses
4. Insurance for any of the above, for accident, disability, sickness, or life
5. Vacation and holiday pay
6. Apprenticeship or other similar programs

But only when the Contractor or Subcontractor is not required by federal, state, or local laws to provide such benefits.

b. **Non-hourly Rate Fringe Benefits in the Wage Determination**

IF

1. The wage determination decision provides for the payment of fringe benefits in a form other than an hourly rate, and
2. The Contractor
   a. Pays a cash equivalent, or
   b. Provides an alternative fringe benefit

THEN

the Contractor must furnish information with his payroll indicating that the cost of

1. The cash payment, or
2. The alternative fringe benefit

is **at least equal to** the cost of the wage determination fringe benefit.

c. **Fringe benefits not in the Wage Determination**

If the Contractor provides a different fringe benefit than that contained in the wage determination, **then** it must show how such fringe benefits are **at least equal to** the required rate.

d. **Resolution of Equivalency Disagreement**

If there is a disagreement between the parties as to an equivalent of any fringe benefit,

Then the Contracting Officer must submit

1. The question, and
2. The recommended resolution

to the Secretary of Labor for **final** determination.

4. **Classification of Unlisted Laborers and Mechanics**

a. Contracting Officer's Duties

If the Contractor employs a class of laborers or mechanics, including apprentices and trainees, **and** such workers are not listed in the wage determination decision,

Then the Contracting Officer must

1. Classify or reclassify such laborers and mechanics in conformity with the wage determination decision, and
2. Notify the Secretary of Labor that such action has been taken

b. Resolution of Classification disagreement

IF

the parties cannot agree on the proper classification class of laborers and mechanics, including apprentices and trainees,

THEN

the Contracting Officer must submit

1. The question, and
2. The recommended resolution

to the Secretary of Labor for **final** determination.

5. **Enforcement**

IF

the Contracting Officer finds that any laborer or mechanic employed by the Contractor or any Subcontractor directly on the site of the work covered by the contract is being paid less than the required rate

THEN

the Contracting Officer may

a. **Terminate,** by **written** notice to the Prime Contractor, its right to continue with the work, **or** such part of the work concerning which the failure to pay the required wages has occured and

b. Have the work finished, by another contract or otherwise, and hold the Contractor and its sureties liable for any excess cost to the Government.

Flow Down

Required at all **Tiers**

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT — OVERTIME COMPENSATION (40 U.S.C. 327-333) (1973 APR)

This contract is subject to the Contract Work Hours and Safety Standards Act and to the applicable rules, regulations, and interpretations of the Secretary of Labor.

(a) The Contractor shall not require or permit any laborer or mechanic in any workweek in which he is employed on any work under this contract to work in excess of eight (8) hours in any calendar day or in excess of forty (40) hours in such workweek on work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of eight (8) hours in any calendar day or in excess of forty (40) hours in such workweek, whichever is the greater number of overtime hours. The ''basic rate of pay,'' as used in this clause, shall be the amount paid per hour, exclusive of the Contractor's contribution or cost for fringe benefits and any cash payment made in lieu of providing fringe benefits, or the basic hourly rate contained in the wage determination, whichever is greater.

(b) In the event of any violation of the provisions of paragraph (a), the Contractor shall be liable to any affected employee for any amounts due, and to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight (8) hours or in excess of the standard workweek of forty (40) hours without payment of the overtime wages required by paragraph (a).

APPRENTICES AND TRAINEES (1972 FEB)

(a) **Apprentices** shall be permitted to work as such only when they are **registered, individually**, under a bona fide apprenticeship program registered with a State apprenticeship agency which is recognized by the Bureau of Apprenticeship and Training. United States Department of Labor; or, if no such recognized agency exists in a State, under a program registered with the aforesaid Bureau of Apprenticeship and Training. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the Contractor as to his entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not a trainee as defined in subparagraph (b) of this clause, who is **not registered** as above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The Contractor shall furnish

Special Notes

None

C. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT: OVERTIME COMPENSATION — COMMENT

1. **Contractor's Duty to Pay Overtime Rates**

   IF

   a Government Contractor or Subcontractor **requires or permits** laborers and mechanics, including watchmen and guards, in its employ **to work on this contract in excess of**

   a. A standard workday of 8 hours, or
   b. A standard workweek of 40 hours

   THEN

   The Contractor must compensate such laborers and mechanics at a rate **not less than 1½ times** the **basic rate** of pay for all hours in excess of

   a. The standard workday, or
   b. The standard workweek.

2. **The Basic Rate of Pay**, as used in this clause, is **either**

   a. The hourly rate of compensation, **exclusive of**
      1. The Contractor's contribution or cost for fringe benefits, and
      2. Any cash payments made in lieu of providing fringe benefits

   OR

   b. The basic hourly rate contained in the wage determination decision whichever is greater.

3. Liability for Violation

   Any failure by a Contractor, during performance of the contract, to compensate its laborers and mechanics as required by this clause shall result in the Contractor's being liable to

   a. The affected employee for the unpaid wages, and
   b. The Government for liquidated damages in the sum of $10 for each individual violation for each calendar day in which such a violation occurred.

4. **Other Provisions**

   This contract is subject to

   a. The provisions on the Contract Work Hours and Safety Standards Act, and
   b. The rules, regulations, and interpretations of the Secretary of Labor.

   NOTE: See the ''Contract Work Hours and Safety Standards Act'' clause (p. I-1) for a more extensive analysis

Flow down

Required at all tiers

Special Notes

None

D. APPRENTICES AND TRAINEES — COMMENT

1. **Apprentices and Trainees**

   a. An ''Apprentice'' is a person who is

      i. **Employed and individually** registered in a bona fide apprenticeship program registered with

         a. The U.S. Department of Labor, Bureau of Apprentices and Training, **or** written evidence of the registration of his program and apprentices as well as of the ratios allowed and the wage rates required to be paid thereunder for the area of construction, prior to using any apprentices in the contract work. ''Apprentice'' means a person employed and individually registered in a bona fide apprenticeship program registered with the United States Department of Labor, Bureau of Apprenticeship and Training, or with a State apprenticeship agency recognized by the Bureau, or a person in his first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Council to be eligible for probationary employment as an apprentice.

(b) Trainees shall be permitted to work as such when they are bona fide trainees employed pursuant to a program approved by the U.S. Department of Labor, Manpower Administration, Bureau of Apprenticeship and Training. ''Trainee'' means a person receiving on-the-job training in a construction occupation under a program which is approved but not necessarily sponsored by the U.S. Department of Labor, Manpower Administration, Bureau of Apprenticeship and Training, and which is reviewed from time to time by the Manpower Administration to insure that the training meets adequate standards.

(c) The Contractor shall make a diligent effort to hire for performance of work under this contract a number of apprentices or trainees, or both, in each occupation, which bears to the average number of the journeymen in that occupation to be employed in the performance of the contract the applicable ratio as set forth in paragraph (c)(6) of this clause.

(1) The Contractor shall assure that twenty-five percent (25%) of such apprentices or trainees in each occupation are in their first year of training, where feasible. Feasibility here involves a consideration of (i) the availability of training opportunities for first year apprentices, (ii) the hazardous nature of the work for beginning workers and (iii) excessive unemployment of apprentices in their second and subsequent years of training.

(2) The Contractor shall, during the performance of the contract, to the greatest extent possible, employ the number of apprentices or trainees necessary to meet currently the requirements of paragraphs (c) and (c)(1) of this clause.

(3) The Contractor shall maintain records of employment on this contract by trade of the number of apprentices and trainees, apprentices and trainees in first year of training, and of journeymen, and the wages paid and hours of work of such apprentices, trainees and journeymen. In addition, the Contractor who claims compliance based on the criterion set forth in paragraph (4)(ii) of this clause shall maintain such records of employment on all his construction work in the same labor market area, both public and private, during the performance of this contract.

(4) The Contractor will be deemed to have made a ''diligent effort'' as required by paragraph (c) if during the performance of this contract, he accomplishes at least one of the following three objectives: (i) the Contractor employs under this contract a number of apprentices and trainees by craft, at least equal to the ratios established in accordance with paragraph (6) of this clause, or (ii) the Contractor employs, on all his construction work, both public and private, in the same labor market area, an average number of apprentices and trainees by craft at least equal to the ratios established in accordance with paragraph (6) of this clause, or (iii) the Contractor (A) if covered by a collective bargaining agreement, before commencement of any work on the project, has given written notice to all joint apprenticeship committees, the local U.S. Employment Security Office, local chapter of the Urban League, Workers Defense League, or other local organizations concerned with minority employment, and the Bureau of Apprenticeship and Training Representatives, U.S. Department of Labor for the locality of the work; (B) if not covered by a collective bargaining agreement, has given written notice to all of the groups stated above, except joint apprenticeship committees, and will in addition notify all non-joint apprenticeship sponsors in the labor market area; (C) has employed all qualified applicants referred to him through normal channels (such as the Employment Service, the Joint Apprenticeship Committees, and where applicable, minority organizations and apprentice outreach programs who have been delegated this function) at least up to the number of such apprentices and trainees required by paragraph (6) of this clause; (D) notice, as referred to herein, will include at least the Contractor's name and address, job site address, value of the contract, expected starting and completion dates, the estimated average number of employees in each occupation to be employed over the duration of the contract work, and a statment of his willingness to employ a number of apprentices and trainees at least equal to the ratios established in accordance with paragraph (6) of this clause. A copy of this notice shall be furnished to the Contracting Officer upon request.

(5) The Contractor shall supply, to the Contracting Officer, and to the Secretary of Labor, a report at three month intervals during performance of the contract and after completion of contract performance a statement describing steps taken toward making a diligent effort and containing a breakdown by craft, of hours worked and wages paid for first year apprentices and trainees, other apprentices and trainees, and journeymen.

(6) The applicable ratios of apprentices and trainees to journeymen in any occupation for the purpose of this clause shall be as follows: (i) In any occupation the applicable ratio of apprentices and trainees to journeymen shall be equal to the predominant ratio for the occupation in the area where the construction is being undertaken, set forth in collective bargaining agreements, or other employment agreements, and available through the Bureau of Apprenticeship and Training Representative, U.S. Department of Labor for the locality of the work. (ii) For any occupation for which no ratio is found, the ratio of apprentices and trainees to journeymen shall be determined by the Contractor in accordance with the recommendations set forth in the Standards of the National Joint Apprentice Committee for the occupation, which are on file at offices of the U.S. Department of Labor's Bureau of Apprenticeship and Training. (iii) For any occupation for which no such recommendations are found, the ratio of apprentices and trainees to journeymen shall be at least one apprentice or trainee for every five journeymen.

- b. A state apprenticeship agency recognized by the Bureau **or**
- ii. In his or her first 90 days of probationary employment in such a registered apprenticeship program and
  - a. **Although not yet** individually registered in the program
  - b. Has been **certified to be eligible** for such probationary employment by
    - i. The Bureau of Apprenticeship and Training, **or**
    - ii. A State Apprenticeship Council.

b. A ''Trainee'' is a person
- i. Receiving on-the-job training in a construction occupation
- ii. Under a program which is
  - a. **Approved** (but not necessarily sponsored) by the U.S. Dept. of Labor, Manpower Administration, Bureau of Apprenticeship and Training
  - b. **Reviewed** from time to time by the Manpower Administration to insure adequate training.

2. **Basic Requirements for the Contractor** (In all contracts in excess of $2,000)

a. Employment

The Contractor may employ
- i. Workers **as apprentices**
  - a. **After** it has submitted **written** evidence of
    - i. The registration of its program and apprentices
    - ii. The ratios allowed, and
    - iii. The wage rates required in the area of construction.
  - b. When the ratio of apprentices to journeymen in a particular craft classification does not exceed the ratio permitted for the Contractor's entire work force under the registered program.
- ii. Workers **as trainees** when
  - a. They are bona fide ''trainees'', and
  - b. Employed under an approved program.

b. **Payment**
- i. The Contractor may pay workers at an apprenticeship wage rate if they are
  - a. Registered as apprentices, or
  - b. Trainees.
- ii. An employee listed on the payroll at an apprentice wage rate who is **NOT**
  - a. Registered as an apprentice, or
  - b. A trainee

  must be paid at the wage rate determined by the Secretary of Labor for the Classification of work actually performed.

3. **The Contractor's Basic Hiring Goals** (in all contracts in excess of $10,000)

a. **Required Ratios**

The Contractor must make a **diligent effort** to hire a number of **apprentices** and **trainees** to perform work on the contract so that, **for any occupation**, **the ratio** of such apprentices and/or trainees to journeymen employed under the contract
- i. Is **equal to the predominant ratio** for the **occupation** in the area where the construction occurs
  - a. As set forth in Collective Bargaining or other employment agreements, and
  - b. Available through the Local Bureau of Apprenticeship and training Representative, U.S. Department of Labor.
- ii. Shall be determined — **when there is no such occupation ratio** — by the Contractor in accordance with the recommendations for the particular occupation set forth in the Standards of the National Joint Apprenticeship Committee (which are on file in the Labor Department's Bureau of Apprenticeship and Training).

iii. Shall be—**for any occupation with no such recommended ratio**—at least one apprentice or trainee for each five journeymen.

b. **Provision for First-Year Employees**

The Contractor must assure, where feasible, that 25% of the Apprentices or Trainees in each occupation are **in their first year of training**, taking into consideration

i. The availability of training opportunities for the first year apprentices,
ii. Possible hazards for beginning workers, and
iii. Any excessive unemployment of apprentices who have completed one or more years of training.

4. **The Contractor's Diligent Effort**

The Contractor will be deemed to have made the required diligent effort when

a. The Contractor **employs** a number of apprentices and trainees by craft at least equal to the required ratios

i. On the construction under this **particular** contract **or**
ii. For its **total** construction work—both public and private—in the **same** labor market area as the contract.

OR

b. The Contractor

i. Has **given a written notice**

a. Which must consist of at least

i. The Contractor's name and address
ii. The job site address
iii. The value of the contract
iv. The expected started and completion dates
v. The estimated average number of employees in each occupation to be employed for the duration of the contract, and
vi. A statement of the Contractor's willingness to employ a number of apprentices and trainees at least equal to the required ratios

b. Which, if the Contractor **is covered by** a collective bargaining agreement, must, before beginning work on the contract, **go to**

i. All joint Apprenticeship Committees
ii. The Local U.S. Employment Security Office
iii. Local Chapters of organizations concerned with minority hiring, such as

a. The Urban League
b. The Workers Defense League

iv. The Local Bureau of Apprenticeship and Training.

c. Which, if the Contractor is **not covered** by a collective bargaining agreement, must **go to**

i. The Local U.S. Employment Security Office
ii. Local chapters of organizations concerned with minority hiring
iii. The Local Bureau of Apprenticeship and Training, and
iv. All non-joint apprenticeship sponsors in the labor area.

NOTE: A copy of this notice must be furnished to the Contracting Officer upon request.

ii. And **has employed all qualified candidates** referred through normal channels at least up to the required craft ratios for apprentices and trainees

5. **The Contractor's Duty to Maintain Records**

The Contractor must maintain records

a. Of employment under this contract by trade of

i. The number of apprentices and trainees
ii. The number of apprentices and trainees in their first year
iii. The number of journeymen
iv. The **wages paid** and the hours of work of each

b. **And**—if the Contractor's ''diligent effort'' is based on its employment in all of its construction

PAYROLLS AND BASIC RECORDS (1969 JUN)

(a) The Contractor shall maintain payrolls and basic records relating thereto during the course of the work and shall preserve them for a period of three (3) years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name and address of each such employee, his correct classification, rate of pay (including rates of contributions for, or costs assumed to provide, fringe benefits), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Contractor has obtained approval from the Secretary of Labor as provided in paragraph (c) of the clause entitled ''Davis-Bacon Act,'' he shall maintain records which show the commitment, its approval, written communication of the plan or program to the laborers or mechanics affected, and the costs anticipated or incurred under the plan or program.

(b) The Contractor shall submit weekly a copy of all payrolls to the Contracting Officer. The Government Prime Contractor shall be responsible for the submission of copies of payrolls of all Subcontractors. The copy shall be accompanied by a statement signed by the Contractor indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor, and that the classifications set forth for each laborer or mechanic conform with the work he performed. Weekly submission of the ''Statement of Compliance'' required under this contract and the Copeland Regulations of the Secretary of Labor (29 CFR, Part 3) shall satisfy the requirement for submission of the above statement. The Contractor shall submit also a copy of any approval by the Secretary of Labor with respect to fringe benefits which is required by paragraph (c) of the clause entitled ''Davis-Bacon Act.''

(c) The Contractor shall make the records required under this clause available for inspection by authorized representatives of the Contracting Officer and the Department of Labor, and shall permit such representatives to interview employees during working hours on the job.

work, similar records must be maintained for all of the Contractor's public and private construction work in the same labor market during the performance of the contract.

6. **The Contractor's Reporting Duties**

The Contractor must provide a **report** to the Contracting Officer and the Secretary of Labor at three month intervals during performance and upon completion of the contract

a. Describing the steps taken toward making a ''diligent effort'' and
b. Containing a breakdown by craft of hours worked and wages paid for
  i. First year apprentices and trainees,
  ii. other apprentices and trainees, and
  iii. Journeymen.

Flow Down

Required by the ''Subcontracts'' clause of the clauses for construction contracts.

Special Notes

Although the clause defines ''Apprentice'' to include unregistered individuals during a probationary period, the language of the clause and supporting regulations (ASPR 18-704.5, FPR 18.705-4) require all apprentices to be individually registered **before** the Contractor may **employ** them **as** ''Apprentices''.

This is confusing, to say the least. It is therefore recommended that the Contractor get the Bureau of Apprenticeship and Training to approve in writing the Contractor's **employment** of unregistered, probationary individuals as ''Apprentices''.

E. PAYROLLS AND BASIC RECORDS — COMMENT

1. **The Contractor's Duty to Maintain Payrolls and Records**

a. For all laborers and mechanics employed at the contract work site, the Contractor must
  i. **Maintain** payroll and related records **during** contract performance, and
  ii. **Preserve them** for 3 years after contract completion.
b. **The Contractor's records** for each laborer and mechanic must contain the person's
  i. Name and address
  ii. Correct classification
  iii. Rate of pay, including fringe benefits
  iv. Number of hours worked by day and week
  v. Deductions made, and
  vi. Actual wages paid.

  IF
c. the Contractor gets approval from the Secretary of Labor to treat its provisions of fringe benefits not expressly listed by the Davis-Bacon Act as part of the ''prevaling wage'' paid under the Act (see the ''Davis-Bacon Act'' clause)

  THEN

  the Contractor must maintain records which show
  i. Its commitment to bear the cost of fringe benefits
  ii. The Secretary of Labor's approval
  iii. Written communication of the plan or program to its affected employees, and
  iv. The anticipated or incurred costs of the plan or program.

2. **Submission of Records**

The Contractor must

a. **Submit weekly a copy of all payrolls** to the Contracting Officer.

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COMPLIANCE WITH COPELAND REGULATIONS (1964 JUN)

The Contractor shall comply with the Copeland Regulations of the Secretary of Labor (29 CFR, Part 3) which are incorporated herein by reference.

b. **Accompany the copy with** either
   - i. Its signed statement indicating that
     - a. The payrolls are complete and correct
     - b. The payroll wage rates are not less than those determined by the Secretary of Labor.
     - c. The employee classifications conform to the actual work performed by each laborer or mechanic.

   OR

   - ii. The ''Statement of Compliance'', a form statement required by the contract and the Copeland Regulations.

c. Submit a copy of any approval by the Secretary of Labor on fringe benefits not expressly listed by the Davis-Bacon Act.

3. **Inspection of Payroll and Related Records and Employee Interviews**

The Contractor must

a. **Make** the payroll and related **records** of mechanics and laborers working at the site of the contract **available** for inspection by authorized representatives of
   - i. The Contracting Officer, and
   - ii. The Department of Labor

b. **Permit** such representatives to have **interviews** with its employees during working hours on the job.

Flow Down

Required at all tiers.

Special Notes

1. The Government Prime Contractor **always** remains responsible for the submission of the payrolls of **all** its Subcontractors.
2. Under the ASPR, the Contracting Officer is expressly ordered to **withhold approval of progress payments** if a Contractor fails to submit its or its Subcontractor's payrolls promptly. The amount to be withheld will be that which is considered necessary to protect the interests of
   - a. The Government, or
   - b. The employees of the Contractor or any Subcontractor.

F. COPELAND REGULATIONS — COMMENT

1. **Payroll Records — Contractor's Duties**

a. The Weekly Statement

The Contractor and its Subcontractors must furnish a weekly statement with respect to the wages of its laborers and mechanics. The statement must be on
   - i. The Government form, ''Statement of Compliance'', or
   - ii. The Government form, ''Payroll (for Contractor's Optional Use)'', or
   - iii. Any other form with identical wording.

b. **Duty to Submit** the Weekly Statement

The Contractor or Subcontractor, within 7 days after the regular payment date of the payroll period, must
   - i. **Deliver** the weekly statement to a representative of the Federal Agency in charge at the site of work, **or** (if there is no such representative at the site)
   - ii. **Mail** the statement to the Federal Agency contracting for or financing the work.

c. **Duty to Preserve** the Payroll Records
   - i. The Contractor or Subcontractor **must preserve** its weekly payroll records until 3 years after

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completion of the contract **and make them available** at all times **for inspection** by the

- a. Contracting Officer or his authorized representative, or
- b. Authorized representatives of the Department of Labor.

ii. Such payroll records must accurately set out each **laborer and mechanic's**

- a. Name and address
- b. Correct classification
- c. Rate of pay
- d. Daily and weekly number of hours worked
- e. Deductions made, and
- f. Actual wages paid.

2. **Rules for Contractor Payroll Deductions**

a. Payroll deductions allowed **without** Secretary of Labor **approval**

The Contractor, without application to and approval by the Secretary of Labor, may make any deduction

- i. Made in compliance with federal, state, or local law (e.g. FICA, withholding of income taxes),
- ii. For sums previously paid as bona fide prepayments (when such prepayment was made without discount or interest),
- iii. Of an amount directed by a court to be paid to another unless the payment is
  - a. To the Contractor, Subcontractor, or an affiliated person, or
  - b. The result of collusion or collaboration,
- iv. Constituting a contribution for the wage earner to funds or insurance to cover
  - a. Medical and/or hospital care
  - b. Death benefits
  - c. Pensions or annuities on retirement
  - d. Compensation for illness, injury, accident, sickness, or disability
  - e. Unemployment benefits
  - f. Vacation pay
  - g. Savings accounts.

But only if the deduction

- a. Is not prohibited by law
- b. Was previously, and voluntarily consented to **in writing** by the wage-earner
- c. Is provided for in a bona fide collective bargaining agreement
- d. Does not — directly or indirectly — benefit the Contractor or Subcontractor
- e. Will serve the convenience and interest of the wage-earner.

- v. For the wage-earner's voluntary purchase of U.S. Bonds.
- vi. Requested by the wage-earner to repay loans or purchase shares in federal or state approved Credit Unions.
- vii. For voluntary contributions to Governmental or quasi-governmental agencies (e.g. Red Cross).
- viii. For voluntary contributions to charities.
- ix. For regular union fees and dues (as provided by the collective bargaining agreement), but **not** fines or special assessments.
- x. For not more than the reasonable cost of board, lodging, and other facilities.
- xi. For safety equipment of nominal value purchased by a wage-earner as his own property when such is not required by law to be provided by the employer.

b. Deductions to be approved by the Secretary of Labor

i. **Standards for Approval**

The Secretary of Labor will approve additional payroll deductions when he finds that the

- a. Contractor, Subcontractor, or an affiliated person does not make a profit or benefit directly or indirectly from the deduction
- b. Deduction is not otherwise prohibited by law
- c. Deduction is either

WITHHOLDING OF FUNDS (1972 FEB)

(a) The Contracting Officer may withhold or cause to be withheld from the Government Prime Contractor so much of the accrued payments or advances as may be considered necessary (i) to pay laborers and mechanics, including apprentices and trainees, employed by the Contractor or any Subcontractor on the work the full amount of wages required by the contract, and (ii) to satisfy any liability of any Contractor for liquidated damages under the clause hereof entitled ''Contract Work Hours and Safety Standards Act — Overtime Compensation.''

(b) If any Contractor fails to pay any laborer or mechanic including any apprentice or trainee employed or working on the site of the work, all or part of the wages required by the contract, the Contracting Officer may, after written notice to the Government Prime Contractor, take such action as may be necessary to cause suspension of any further payments or advances until such violations have ceased.

        i. **Voluntarily consented** to by the wage-earner in a writing in advance (such consent may **not** be a condition of employment or its continuance), or
        ii. **Provided for** in a bona fide collective bargaining agreement

AND

    d. Deduction serves the convenience and interest of the wage-earner.

ii. **Application Process**

The Contractor's or Subcontractor's application to the Secretary of Labor for approval to make additional deductions

    a. Must be in writing and addressed to the Secretary of Labor
    b. Need not specify the contract involved because the Secretary of Labor's approval will apply to all current and future contracts for 1 year
    c. Must state that it is in compliance with the Standards for Approval and include facts proving such compliance
    d. Must include
        i. A description of the proposed deduction
        ii. The purpose of the deduction, and
        iii. The classes of laborers and mechanics from whose wages the deduction would be made
    e. Must state the name, business, and relation to the applicant of any third person who will receive the funds from the proposed deduction.

iii. **Prohibited Deductions**

Any deduction not permissible without the approval of the Secretary of Labor is prohibited.

3. **Method of Paying Wages**

The only methods by which wages may be paid are

a. Cash
b. Negotiable instruments payable on demand, or
c. Any additional form of compensation for which deductions are permissible.

Flow Down

Required in all subcontracts.

Special Note

None.

G. WITHHOLDING OF FUNDS — COMMENT

1. **Withholding to Pay Employees and Cover Liquidated Damages**

The Contracting Officer **may withhold** or cause to be withheld from the Government Prime Contractor's **accrued payments** or **advances** any amount considered necessary to

a. Pay the full amount of wages due under the contract to the Laborers and mechanics (and apprentices and trainees) employed by the
    i. **Contractor, or**
    ii. Any of its **Subcontractors**, and
b. **Satisfy any liability** of any Contractor to the United States **for liquidated damages**, as determined by the ''Contract Work Hours and Safety Standards Act-Overtime Compensation'' clause.

2. **Suspension of Further Payments or Advances**

If

any Contractor fails to pay any laborer or mechanic (including apprentices and trainees) **employed on the**

CONTRACT TERMINATION — DEBARMENT (1972 APR)

A breach of the clauses hereof entitled ''Davis-Bacon Act,'' ''Contract Work Hours and Safety Standards Act — Overtime Compensation,'' ''Apprentices and Trainees,'' ''Payrolls and Basic Records,'' ''Compliance With Copeland Regulations,'' ''Withholding of Funds,'' and ''Subcontracts'' may be grounds for termination of the contract, and for debarment as provided in 29 CFR 5.6.

SUBCONTRACTS (1972 FEB)

The Contractor agrees to insert the clauses hereof entitled ''Davis-Bacon Act,'' ''Contract Work Hours and Safety Standards Act — overtime Compensation,'' ''Apprentices and Trainees,'' ''Payrolls and Basic Records,'' ''Compliance with Copeland Regulations,'' ''Withholding of Funds,'' ''Subcontracts,'' and ''Contract Termination — Debarment'' in all subcontracts. The term ''Contractor'' as used in such clauses in any subcontract shall be deemed to refer to the Subcontractor in the phrase ''Government Prime Contractor.''

site of work any part of the time required wages,
THEN
the Contracting Officer may, **after giving written notice** to the Government Prime Contractor, take such action as necessary to **suspend** any further payments or advances until the violations end.

Flow Down

Required in all subcontracts

Special Note

None.

H. CONTRACTOR TERMINATION — DEBARMENT — COMMENT

1. **Possible Government Methods of Contract Enforcement**

Any breach of any requirement of any of the clauses for contracts involving construction work **may be** grounds for

a. Termination of the contract.
b. Debarment pursuant to U.S. Labor regulations which provide for
   i. Compliance investigation, and
   ii. Debarment procedures.

2. **Ineligibility of the Contractor**

a. **Breaches of the Davis-Bacon Act** are governed by the termination provision prescribed in that Act and appearing in the Davis-Bacon Act Clause.
b. Breaches of any of the other clauses for contracts involving construction work:

IF

a Contractor's or Subcontractor's breach is found to be a **willful or aggravated violation** by the
   i. Secretary of Labor, or
   ii. Agency Head, with the concurrence of the Secretary of Labor

THEN

The breach shall result in the **debarment from** any contracts subject to the Acts listed in the Labor Regulations (29 CFR § 5.1) (including the Copeland Act, Contract Work Hours Standards Act, and Davis-Bacon Act) for a period not to exceed 3 years **of**
   i. The Contractor
   ii. The Subcontractor, or
   iii. Any firm, corporation, partnership, or association in which the Contractor or Subcontractor has a substantial interest.

c. Removal from the Debarred Bidders List will occur on a finding by the solicitor that the Contractor or Subcontractor has shown a current responsibility to comply with the Labor Standards Provisions.

I. SUBCONTRACTS (1972 FEB)

1. **Flow Down Required for all Construction Contracts**

The Contractor must insert the Labor Standards Provisions in **all** of its subcontracts. Again, these provisions are the clauses entitled

a. Davis-Bacon Act
b. Contract Work Hours and Safety Standards Act — Overtime Compensation

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B-2

B-3 EXCUSABLE DELAYS

Except with respect to defaults of Subcontractors the Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the Contractor to make progress in the prosecution of the work hereunder which endangers such performance) if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to: acts of God or of the public enemy; acts of the Government in either its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes; freight embargoes; and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the failure of a Subcontractor to perform or make progress and if such failure arises out of causes beyond the control of both the Contractor and the Subcontractor, and without the fault of negligence of either of them, the Contractor shall not be deemed to be in default, unless (1) the supplies or services to be furnished by the Subcontractor were obtainable from other sources, (2) the Contracting Officer shall have ordered the Contractor in writing to procure such supplies or services from such other sources, and (3) the Contractor shall have failed to comply reasonably with such order. Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of such failure and, if he shall determine that any failure to perform was occasioned by any one or more of the said causes, the delivery schedule shall be revised accordingly, subject to the rights of the Government under the clause hereof entitled ''Termination.'' (As used in this clause, the terms ''Subcontractor'' and ''Subcontractors'' mean Subcontractor(s) at any tier.)

c. Apprentices and Trainees **B-2**
d. Payrolls and Basic Records
e. Compliance with Copeland Regulations
f. Withholding of Funds
g. Subcontracts (For Flowdown ad infinitum), and
h. Contract-Termination-Debarment.

2. **Terminology**

The term ''Contractor'' as used by the Labor Standards Provisions in subcontracts automatically means the Subcontractor.

Only the phrase ''Government Prime Contractor'', (e.g. as found in the ''Withholding of Funds'' clause) will continue to refer to the Contractor.

EXCUSABLE DELAYS

B-3

References

ASPR 7.403-5 incorporates 7-203.11 (1969 AUG)
FPR 1-7.202-11 incorporates 1-8.708

Source of Clause

Regulation

Purpose of Clause

To define circumstances where the Contractor is not penalized for delays in performance, and to establish a procedure for identifying such circumstances.

Comment

1. Excusable delays are failures to perform the contract due to causes
   a. ''Beyond the control of'' and
   b. ''Without the fault or negligence of'' the Contractor.
2. **Examples** of excusable delays include
   a. Acts of God or the Public Enemy
   b. Disasters
   c. Acts of the Government
   d. Strikes (may not be if the Contractor aggravates them).
3. Subcontractor Failure

IF

The Contractor's failure to perform is due to

a. The Failure of the Subcontractor, **and**
b. Causes ''Beyond the Control of'' and ''without the fault or negligence of'' **both** the Contractor and the Subcontractor

THEN

The Contractor is **not** in default

UNLESS

a. The Contractor could have gotten the supplies or services elsewhere
b. The Contracting Officer orders the Contractor to so get them **in writing**
c. And the Contractor does not comply with the order.

4. The procedure to identify an ''Excusable Delay'':

a. The Contractor requests the Contracting Officer to investigate a delay
b. The Contracting Officer

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B-4 GOVERNMENT BILL OF LADING AND MAILING INDICIA (1966 AUG)

(a) When it is provided in this contract that the supplies shall be delivered other than FOB specified destinations, or freight prepaid, shipment(s) shall be made on U.S. Government Bills of Lading or U.S. Government Mailing Indicia. The required number of Government Bills of Lading and Mailing Indicia shall be furnished to the Contractor by the cognizant transportation or other activity. The Contractor shall acknowledge receipt of Government Bills of Lading and Mailing Indicia in the manner prescribed by the issuing office. As shipments are made, the Contractor shall prepare, or complete, and distribute Government Bills of Lading in accordance with instructions of the issuing office.

(b) U.S. Government Mailing Indicia shall be used in lieu of U.S. Government Bills of Lading when weight, cube, character of commodity permit movement within the U.S. Postal System.

(c) The Contractor agrees that Government Bills of Lading and Mailing Indicia in excess of the requirements of this contract shall be returned to the issuing office(s) not later than submission time of final invoice for payment. The Contractor also agrees that no mailing charge is, or will be included in the cost/price for postage fees in those instances wherein Government Mailing Indicia is authorized and used.

(d) For the purpose of this clause, the term **supplies** shall include correspondence, publications, and other written material.

B-3

- i. Investigates the delay,
- ii. Determines the causes,
- iii. Determines how long a delay is excusable, and
- iv. Revises the delivery schedule.

Flow Down

Not required. The Contractor may want to include a clause in the subcontract terminating it in case his contract is terminated by the Government.

Special Notes

The Government under the ''Terminations'' clause can terminate the contract at any time; ''Excusable Delays'' does not affect that right.

GOVERNMENT BILL OF LADING AND MAILING INDICIA

B-4

Reference

AF ASPR Sup. 7-104.101 (1966 AUG)

Source of Clause

Regulation

Purpose of Clause

To reduce the cost to the Government of contract items delivered by mail or otherwise.

Comment

1. Under the contract, supplies, publications, correspondence and other written material will be delivered in three ways:
   - a. FOB specified destinations
   - b. Freight prepaid, or
   - c. Otherwise.
2. **If** the contract provides that such supplies, publications, correspondence, or other written material shall be delivered other than by FOB specified destinations or freight prepaid **then** shipments must be made on
   - a. U.S. Government mail indicia or
   - b. U.S. Government bills of lading.
3. The Contractor's use of Government Mailing Indicia and Bills of Lading.

   The cognizant transportation or other activity shall furnish the required number of Government bills of lading and mailing indicia to the Contractor. Thereafter, the Contractor must
   - a. **Acknowledge receipt** of the Government bills of lading and mailing indicia in the manner prescribed by the issuing office
   - b. When using Government bills of lading, prepare, **complete, and distribute them** in accordance with the instructions of the issuing office
   - c. When using authorized, Government mailing indicia, **exclude mailing charges** from the cost or price of postage fees under the contract
   - d. **Return all** Government bills of lading and mailing indicia in excess of contract requirements to the issuing office(s) **not later than** the time when submitting the final invoice for payment.

Flow Down

Not required.

Special Notes

Use of Government mailing indicia is preferred. They shall be used instead of Government bills of lading whenever the weight, cube, and character of the item being shipped permit use of the U.S. Postal System.

B-5 KEY PERSONNEL

Where ''key personnel'' have been identified in this contract, it has been determined that such named personnel are necessary for the successful performance of the work under this contract; and the Contractor agrees to assign such personnel to the performance of the work under this contract and shall not remove or replace any of them without the consent of the Contracting Officer. Whenever, for any reason, one or more of the aforementioned personnel is unavailable for work under this contract during a continuous period in excess of three months, or is expected to devote substantially less effort to the work than initially anticipated, the Contractor shall immediately notify the Contracting Officer to that effect and shall, subject to the approval of the Contracting Officer without formal modification to the contract, replace such personnel with personnel of substantially equal ability and qualifications. **Provided, however,** in the event the Contracting Officer determines that suitable replacement of key personnel is not feasible or that the reduction of effort would be so substantial as to impair the successful prosecution of the work, the Contracting Officer may direct that the contract be changed or terminated, pursuant to the clauses of this contract entitled ''Changes'' **or** ''Termination for the Convenience of the Government,'' or may take such other action with respect thereto that **he** deems appropriate.

KEY PERSONNEL

Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To assure that the person or persons in responsible positions in the research project are fully qualified to conduct the research.

Comment

1. ''Key Personnel'' are persons **specified** as necessary for the successful completion of work under the contract.
2. **Contractor's agreement.** Where ''Key Personnel'' are **so designated by express statement in the contract,** the Contractor agrees
   a. to assign such personnel to work under the contract, **and**
   b. not to remove or replace them without the consent of the Contracting Officer.
3. **Notice and Replacement**

   IF

   For any reason, one or more ''Key Personnel''

   a. is unavailable for work for a period exceeding 3 consecutive months, or
   b. is expected to devote substantially less effort to the work than originally thought,

   THEN

   the Contractor shall

   a. immediately notify the Contracting Officer, and
   b. replace such personnel with personnel of equal ability and qualification, **subject to** the approval of the Contracting Officer
4. **Change Or Termination**

   IF

   the Contracting Officer determines that

   a. the replacement of ''Key Personnel'' is not feasible, or that
   b. the reduction of effort toward contract performance is so substantial as to impair the successful completion of work,

   THEN

   the Contracting Officer may

   a. change the contract pursuant to the ''Changes'' clause, or
   b. terminate the contract pursuant to the ''Termination for the Convenience of the Government'' clause, or
   c. take any other action he considers appropriate under the circumstances.

Flow Down

Not Required.

Special Notes

1. The Contracting Officer's consent to the removal of persons designated in the contract as ''Key Personnel'' is **not** required to be in writing. However, the Contractor may always want to get such a writing.
2. No matter how important a person may have become during the performance of a contract, **if he was not listed** as ''Key Personnel'' in the contract, the Contracting Officer's consent to his replacement or removal is **not** required.

B-6 MILITARY SECURITY REQUIREMENTS (1971 APR)

(a) The provisions of this clause shall apply to the extent that this contract involves access to information classified ''Confidential,'' ''Secret'' or ''Top Secret.''

(b) The Contractor shall comply with (i) the Security Agreement (DD Form 441), including the attached Department of Defense Industrial Manual for Safeguarding Classified Information (DoD 5220.22-M); and (ii) any revisions thereto, notice of which has been furnished to the Contractor.

(c) If, subsequent to the date of this contract, the security classifications or security requirements under this contract are changed by the Government as provided in this clause, and if such changes cause an increase or decrease in the estimated cost or time required for performance of this contract, the estimated cost, fee, delivery schedule, or any other provision of the contract that may be affected, shall be subject to an equitable adjustment. Any such equitable adjustment shall be accomplished in the manner set forth in the ''Changes'' clause of this contract.

(d) The Contractor agrees to insert in all subcontracts hereunder which involve access to classified information provisions which shall conform substantially to the language of this clause, including this paragraph (d) but excluding the last sentence of paragraph (c) of this clause.

MILITARY SECURITY REQUIREMENTS

Reference

ASPR 7-402.24 incorporates 7-104.12 (1971 APR) as modified by 7-204.12 and 7-402.24

Source of Clause

Regulation, pursuant to executive order 10865, §1, Feb. 20, 1960 (25 F.R. 1583) as amended

Purpose of Clause

To insure that Government Contractors comply with the military security requirements at all times during contract performance. To provide a procedure for adjusting the contract if changes in such security requirements cause changes in an ongoing contract.

Comment

1. **Applicability of the Clause in Classified Contracts.**

   If the Contractor or its employees may have access to classified information during their work under the contract, this clause will apply. Such information will be classified as:

   ''Confidential''
   ''Secret''
   ''Top Secret''

2. **Contractor's Security Compliance**

   The Contractor must comply with

   a. The Security agreement, including the Department of Defense Industrial Security Manual for Safeguarding Classified Information which should be attached.

   b. **Any revisions** of such, if the Contractor has been notified of the revision.

3. **Adjustments for changes in security classifications or requirements.**

   IF

   a. the security classifications or requirements under this contract are changed by the Government after the date of this contract,

   AND

   b. such changes cause an increase or decrease in
      i. the estimated cost, or
      ii. the time required for performance

   THEN

   the estimated cost, delivery schedule, or any other provision of the contract may be equitably adjusted under the ''Changes'' clause.

4. **Continuation or termination when security is increased.**

   a. The Contractor must make every reasonable effort, **compatible with its established policies,** to continue work under the contract in compliance with the new security rules.

      IF

   b. nevertheless, the Contractor decides that it is not able to continue work under the increased security requirements,

      THEN

      i. the Contractor shall notify the Contracting Officer of such decision in writing.
      ii. 15 days after the receipt of such notice by the Contracting Officer, the Contractor may request that the contract be terminated in whole or in part, **unless**
         a. the Contracting Officer's investigation has resulted in a determination that the increased security is not required, **OR**
         b. the Contracting Officer and the Contractor have negotiated a mutually satisfactory agreement.
      iii. Upon receiving a valid request, the Contracting Officer shall terminate the contract, in whole or in part, and such termination will be treated as in the clause ''Termination for the Con-

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B-7 NOTICE TO GOVERNMENT OF LABOR DISPUTES

(a) Whenever the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract the Contractor shall immediately give notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

(b) The Contractor agrees to insert the substance of this clause, including this paragraph (b), in any subcontract hereunder as to which a labor dispute may delay the timely performance of this contract; except that each such subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the Subcontractor, or the Prime Contractor, as the case may be, of all relevant information with respect to such disputes.

B-8 NOTICE TO THE GOVERNMENT OF DELAYS

Whenever the Contractor has knowledge that any actual or potential situation, including, but not limited to, labor disputes, is delaying or threatens to delay the timely performance of the work under this contract, the Contractor shall immediately give written notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

venience of the Government.'' B-6

Flow Down

Required, at all tiers. The substance of the clause is required on all subcontracts which may involve access to classified information, (except that including the ''Changes'' provision of this clause is not required)

Special Notes

1. Additional security requirements beyond those in the Defense Industrial Security Manual may be inserted at the time of signing, if warranted.
2. Defense Department Form 254, Item 12, notes that even unclassified information must be cleared prior to release, if it relates to a classified contract. (See ''Acknowledgement of Sponsorship'').

NOTICE TO THE GOVERNMENT OF LABOR DISPUTES

B-7

References

ASPR 7-403.10 incorporates 7-104.4 (1958 SEP)
FPR 1-7.203-3

Source of Clause

Regulation

Purpose of Clause

To provide for prompt notification by the Contractor to the Government of delay-causing labor disputes in important contracts so that the Government can make informed decisions.

Comment

1. Whenever the Contractor learns that a labor dispute (or potential labor dispute)
    a. **Is preventing** the work under the contract from being completed on time, **OR**
    b. **Threatens** to prevent such timely completion, the Contractor must **immediately** notify the Contracting Officer of such labor dispute, and provide all pertinent information.
2. It is the **Contractor's** responsibility to notify the Contracting Officer of delay-causing labor disputes in subcontracted work.

Flow Down

Required, ad infinitum. In this way, knowledge of labor disputes is passed up the line until it reaches the Prime Contractor.

Special Notes

1. This clause is not used in all contracts. Under the ASPR, it is used in contracts for urgent items or where deemed appropriate; under the FPR it is used whenever a work stoppage would delay an urgent program.
2. If a labor dispute becomes a strike, the delay caused **may** be an excusable delay.
3. The notice of the potential or actual labor dispute does not have to be in writing.

NOTICE TO THE GOVERNMENT OF DELAYS

B-8

Reference

HEW (Rev. 12/72)

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B-9 PREFERENCE FOR UNITED STATES FLAG AIR CARRIERS (1974 NOV)

(a) It is the policy of the United States that all federal agencies and Government Contractors and Subcontractors utilize U.S. flag air carriers for international air transportation of personnel and cargo.

(b) The Contractor agrees to utilize U.S. flag air carriers to the maximum extent practicable in connection with the performance of this contract in the transportation by air of any personnel and cargo between the United States and a foreign country, or between foreign countries.

(c) The terms used in this clause have the following meanings:

(1) ''International air transportation'' means transportation by air of personnel and cargo from the United States to a foreign country, between two or more foreign countries, and between a foreign country and the United States.

(2) ''U.S. flag air carrier'' means one of a class of air carriers holding a certificate of public convenience and necessity issued by the Civil Aeronautics Board, approved by the President, authorizing operations between the U.S. and/or its territories and one or more foreign countries.

(3) The term ''United States'' includes the fifty states, Puerto Rico, possessions of the U.S. and the District of Columbia.

(4) ''Practicable'' includes (i) satisfactory servicing of agency programs, and (ii) timely deliveries at fair and reasonable prices.

(d) The Contractor shall include the substance of this clause, including this paragraph (d) in each subcontract or purchase hereunder which may involve air transportation between the U.S. and a foreign country or between foreign countries.

Source of Clause

Regulation

Purpose of Clause

To require the Contractor to alert the Government whenever there may possibly be a delay in the work under the contract so as to permit the Government to act accordingly.

Comment

1. The Contractor must send **written** notice to the Contracting Officer of
   a. Any actual delays
   b. Any potential delays, including, but not limited to, labor disputes
2. The written notice should explain the cause and extent of the delay, and any other relevant information.

Flow Down

Not Required. However, the Contractor is responsible for reporting delays that occur in subcontracted work when they will delay work under his contract.

Special Notes

1. It is unclear how speculative a Delay may be and still qualify as a ''Potential Delay.'' The Contractor must make a reasonable determination.
2. It is also unclear what the purpose of requiring notice is. Is it to allow the Government to terminate the contract, to assist the Contractor, or just to obtain the information as soon as possible?
3. This clause, while requiring notice, does not, in itself, make any delays excusable or their costs allowable.

PREFERENCE FOR U.S. FLAG CARRIERS

B-9

References

ASPR 7-204.60, in accordance with 1-336.1(b), incorporates 7-104.95 (1974 NOV)
FPR 1-1.323

Source of Clause

Regulation

Purpose of Clause

To implement a policy decision requiring that U.S. flag air carriers be used for the international air transportation of the personnel and cargo of federel agencies and Government Contractors and Subcontractors.

Comment

1. **The Contractor's Basic Agreement**

IF

in connection with the performance of the contract, the Contractor's personnel or cargo may be transported

a. Between the 50 states, Puerto Rico, U.S. possessions, the District of Columbia (i.e. the ''United States'') and a foreign country or
b. Between two or more foreign countries

THEN

the Contractor agrees to use in any such transportation a **U.S. Flag Air Carrier:** One of a class of air carriers holding a **certificate of public convenience and necessity** authorizing operations between the United States and/or its territories and one or more foreign countries

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B-10 PRIORITIES, ALLOCATIONS, AND ALLOTMENTS (1974 APR)

The Contractor shall follow the provisions of DMS Reg. 1 or DPS Reg. 1 and all other applicable regulations and orders of the Bureau of Competitive Assessment and Business Policy in obtaining controlled materials and other products and materials needed to fill this order.

   a. Issued by the Civil Aeronautics Board, and
   b. Approved by the President.

2. **Limitation: The "Maximum Extent Practicable"**

   The Contractor's transportation agreement is not absolute; it applies to the maximum extent practicable.

   IF

   U.S. Flag Air Carriers do not provide
   a. Satisfactory servicing of agency programs, or
   b. Timely deliveries at fair and reasonable prices

   THEN

   the Contractor is not required to use such carriers.

Flow Down

Required when international air transportation of personnel and cargo is possible under the subcontract.

Special Notes

1. This clause is neither listed nor referred to in the FPR contract clause section. (FPR 1-7) However it is required **when** applicable.
2. In order to reduce administrative costs, both the ASPR and the FPR will exempt ''small purchases'' (those under $2,500) from the coverage of this clause.

PRIORITIES, ALLOCATIONS, AND ALLOTMENTS

B-10

References

ASPR 7-403.7 incorporates 7-104.18 (1974 APR) in accordance with 1-307.2
NASA PR 7.452-7 incorporates 1.307-2 (1971 OCT)

Source of Clause

Regulation, authorized by the Defense Production Act of 1950, 50 U.S.C. §§2061, 2062, 2071; Executive Order No. 10161, September 9, 1950 (15 F.R. 6105), as amended.

Purpose of Clause

To keep defense programs on schedule and maintain the ability to mobilize economic resources in the event of war or national emergency.

Comment

1. **Contractor's Basic Duty**

   In obtaining **"controlled materials"** and **other products needed** to perform the contract, the Contractor must comply with
   a. The provisions of Defense Materials System (DMS) Regulation No. 1,
   b. The provisions of Defense Priorities System (DPS) Regulation No. 1, and
   c. The orders of the Bureau of Competitive Assessment and Business Policy (part of the Department of Commerce).

2. **The Defense Materials System and the Defense Priorities System**

   a. **DMS coverage**

      The Defense Materials System relates primarily to ''controlled materials'' i.e., steel, copper, aluminum and nickel alloys.

   b. **DPS coverage**

      The Defense Priorities System relates to products and materials other than ''controlled materials''.

   c. **Impact of the Systems**

      DMS Reg. No. 1 and DPS Reg. No. 1 establish procedures wherein certain supply orders will be given ratings entitling

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B-11 PROTECTION OF HUMAN SUBJECTS

A. The Contractor agrees that the rights and welfare of human subjects will be protected in accordance with procedures specified in its current Institutional Assurance on file with the Department. The Contractor further agrees to provide certification at lease annually that an appropriate institutional committee has reviewed and approved the procedures which involve human subjects in accordance with the applicable Institutional Assurance accepted by the Department.

B. The Contractor shall bear full responsibility for the proper and safe performance of all work and services involving the use of human subjects under this contract. The parties hereto agree that the Contractor retains the right to control and direct the performance of all work under this contract. No provision of this contract shall be deemed to constitute the Contractor or any Subcontractor, agent or employee of the Contractor or any other person, organization, institution, or group of any kind whatsoever, as the agent or employee of the Government. The Contractor agrees that it has entered into this contract and will discharge its obligations, duties, and undertakings and the work pursuant thereto whether requiring professional judgment or otherwise as an independent Contractor and without liability on the part of the Government.

1. The Government (Defense Department or NASA) to priority treatment in obtaining the necessary materials. B-10
2. The supply Contractor to priority treatment from its suppliers in procuring the materials called for by its contract with the Government.

Flow Down

Required when necessary.

Special Notes

1. DMS Reg. No. 1 and DPS Reg. No. 1 are set forth in 32A C.F.R. Chapter VI.

PROTECTION OF HUMAN SUBJECTS B-11

Reference

HEW — Special Provision

Source of Clause

Regulation — 39 Federal Register No. 105 Part II, pp. 18914-18920, May 30, 1974 (See Special Note #1)

Purpose of Clause

To require the Contractor to assume **full responsibility** for safeguarding the legal rights and welfare of human subjects of research funded by HEW. To require certain procedures whereby the Contractor can safeguard those rights and welfare.

Comment

1. **The Contractor's Control and Responsibility**

   The Contractor:

   1. **Retains the right to control** and direct performance of all work under the contract.
   2. **Bears full responsibility** for the proper and safe performance of all work and services involving the use of human subjects under the contract.
   3. Recognizes that it is **not** an agent or employee of the Government
   4. Agrees that it is an independent Contractor.

2. The Contractor Agrees
   - a. **To file** a written Institutional Assurance that it will follow HEW policy in protecting human subjects.
   - b. **To protect** the rights and welfare of human subjects in accordance with the current, accepted Institutional Assurance on file with HEW.
   - c. **To certify** to HEW that an **appropriate review committee** within the Institution has at least annually
     1. Reviewed procedures involving human subjects, and
     2. Approved them in accordance with the Institutional Assurances.

3. **The "Institutional Assurance"** is
   - a. A written document required of all grantees and Contractors who receive support from HEW for research, development, and related activities involving human subjects.
   - b. A statement of compliance with
     1. HEW policy on human subjects, and
     2. Requirements for initial and continuing committee review of supported activities.
   - c. A set of implementing guidelines adopted by the institution, including
     1. Identification of the Contractor's review committee
     2. A destription of its review procedures.

   (For single activities or projects, a report of the committee's initial findings and proposed continuous Review procedures is required)

4. **Types of Assurances**

a. **The General Assurance**
  1. Is required where a significant number of concurrent HEW-supported projects or activities involving human subjects are carried on by the Contractor.
  2. Must contain, as a minimum, guidelines providing
    a. A statement of principles governing the discharge of the institution's responsibility to protect human subjects.
    b. A committee or committee structure to conduct initial and continuing reviews
      1. Of at least five people of varying background
      2. Qualified to
        a. **Insure respect** for its advice and counsel for safeguarding the rights and welfare of human subjects.
        b. **Ascertain** the acceptability of proposals in terms of organizational commitments and regulations, applicable law, standards of professional conduct and practices, and community attitudes.
      3. So arranged as to prevent
        a. Conflicts of interest, or
        b. Domination by a single profession, or
        c. Quorums of less than a majority of total membership.
    c. Initial and continuing proposal and activity review procedures.
    d. Institutional procedures
      1. To advise and counsel activity directors about committee actions.
      2. To insure prompt reporting of
        a. Proposed changes in an activity and unanticipated problems involving risk to human subjects to the committee
        b. Such problems to HEW
    e. Self-maintenance procedures

b. **The Special Assurance**
  1. Is appropriate for a single activity or project.
  2. Must contain, as a minimum requirement,
    a. Identification of the specific grant or contract.
    b. The same guidelines for the composition of the Contractor's review committee as are required in a general assurance.
    c. Description, in general terms, of
      1. The inherent risk of the activity
      2. The justification for allowing the subject to accept the risk.
    d. Description of the procedure for obtaining informed consent, and documentation of such procedure.
    e. Description of the reporting procedures established to meet the same requirements as for a general assurance.
    f. Indication of the times (at least annually) when the committee will meet to provide continuing review of projects involving human subjects.

5. **Review Standards Under Assurance Procedures**

Under HEW policy, no activity involving human subjects will be supported unless a certificate of the Contractor's committee's review and approval of the activity has been submitted. The committee review must

a. **Determine** if a subject will be placed at **risk,** risk being defined as exposure to the possibility of injury, including physical, psychological, or social injury, as a consequence of participation as a subject in any research, development, or related activity which
  1. Departs from the application of those established and accepted methods necessary to meet the subject's needs

  OR

  2. Increases the ordinary risks of daily life, including the recognized risks inherent in a chosen occupation or field of service, **AND**

b. If risk is involved, **determine whether**
  1. The subject shall be **allowed** to accept the risk. This occurs only when the risks to the subject are

outweighed by the sum of
  a. The benefit to the subject, and
  b. The importance of the knowledge to be gained.
2. The rights and welfare of any such subject will be adequately protected.
3. Legally effective **informed consent** will be obtained by adequate and effective methods.
4. The conduct of the activity will be reviewed at timely intervals.

6. **Informed Consent**

a. When a subject is to be placed at risk, the institution **must** obtain and document legally effective informed consent

''Informed Consent'' means the knowing consent of an individual or his legally authorized representative, so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress or other form of constraint or coercion

b. The basic elements of **information necessary** for informed consent include
  1. **Fair explanation** of the procedures and their purposes with identification of any which are experimental
  2. **Description** of any attendant discomforts and **risks** reasonably expected
  3. Description of **benefits** reasonably expected
  4. **Disclosure of** any appropriate **alternative** procedures that might be advantageous to the subject
  5. An **offer** to answer any inquiries about the procedures
  6. **Instruction** that the subject is free at any time to withdraw consent and cease participating in the activity or project without prejudice.

c. **No** informed consent obtained under an assurance required by the clause shall contain any **exculpatory language** through which the subject is made to waive, or appear to waive, any of his legal rights, including any release of the organization or its agents from liability for negligence.

7. **Documentation of Informed Consent**

The **actual procedure used** to obtain legally effective informed consent and the **basis for the committee's determination** that the procedures are adequate **must be documented.** One of three forms may be used:

a. A written document embodying all the basic elements of informed consent; it may be **read to** the subject or his legally authorized representative who shall in addition, be given adequate opportunity to read it. The document must be signed by the proper party and sample copies must be retained by the committee.

b. A ''short form'' written document indicating that the basic elements of informed consent, conforming to written summaries approved by the review committee, have been presented orally to the subject or his legally authorized representative and signed by the proper party **and** an auditor who witnessed the presentation and signature. A copy of a written summary reflecting any additions, must be signed by the person officially obtaining the consent **and** the auditor witness. Sample copies of the approved form and summary must be retained by the committee.

c. A modification of either of the above procedures is permitted where the Contractor and its Review Committee establish that
  1. The risk to any subject is minimal,
  2. Use of either procedure would invalidate obligations of considerable immediate importance,
  3. Any other reasonable alternative method of consent documentation would be less advantageous to the subjects.

Enforcement

IF

the Secretary of HEW determines that the Contractor has failed **materially** to comply with HEW human subject policy with respect to a particular grant or contract,

THEN

he may, in the manner prescribed by the grant, contract, or procurement regulations

a. Suspend or
b. Terminate the contract or grant.

NOTE: Such termination and any past deficiencies in complying with the clause may be taken into account in evaluating any later proposals or applications for support of activities involving human subjects.

B-11

B-12 QUESTIONNAIRES AND SURVEYS

In the event the performance of this contract involves the collection of information upon identical items from 10 or more persons, other than Federal Employees, the Contractor shall obtain written approval from the Contracting Officer, prior to the use thereof, of any forms, schedules, questionnaires, survey plans or other documents, and any revisions thereto, intended to be used in such collection.

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B-11

HEW policy places responsibility for safeguarding the rights and welfare of human subjects upon the institution which receives the funds or which is accountable to HEW. Therefore, any Contractor which has a subcontract involving human subjects must, **at the least,** require the Subcontractor to conduct its activities in a manner consistent with this clause.

Special Notes

1. The federal regulations protecting human subjects upon which this analysis was done were published relatively recently. It is possible that HEW (and other agencies) has published additional guidance for the protection of human subjects since the preparation of this analysis.
2. The research investigator and administrator should make an effort to stay abreast of developments in governmental protection of human subjects. Such may broaden the Contractor's responsibility and impose additional requirements. For example, HEW plans to develop policies governing research, development, and related activities which involve the prisoner, child, fetus, abortus, or any institutionalized individual with a mental disability.

QUESTIONNAIRES AND SURVEYS

B-12

Reference

HEW — 315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To provide for Government control over questionnaires and surveys to be used in contract performance.

Comment

IF

Performance of the contract involves the collection of information upon identical items from 10 or more persons, not including Federal employees,

THEN

The Contractor must get written approval from the Contracting Officer prior to the use of

1. Any forms
2. Schedules
3. Questionnaires
4. Survey plans
5. Or other documents
6. And any revisions of such

in collecting the information.

Flow Down

Not required.

Special Note

None.

B-13 PRINTING

Unless otherwise specified in this contract, the Contractor shall not engage in, nor subcontract for, any printing (as that term is defined in title I of the Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract: **Provided, however,** That performance of a requirement under this contract involving the reproduction of less than 5,000 production units of any one page, or less than 25,000 production units in the aggregate of multiple pages, will not be deemed to be printing. A production unit is defined as one sheet, size 8 by 10½ inches, one side only, one color.

B-14 RESTRICTIONS ON PRINTING (1974 JUN)

Duplication of reports, data or other written material, if required, is authorized provided that the material produced does not exceed 5,000 production units of any page and that items consisting of multiple pages do not exceed 25,000 production units in the aggregate. The aggregate number of production units is to be determined by multiplying pages times copies. For purposes of this paragraph a production unit is one sheet, size 11'' by 17'' or less (10¾'' by 14¼'' maximum image), one side only, one color. Duplication of material in excess of the quanties cited above shall not be accomplished without express prior written authorization from the Contracting Officer. These restrictions do not preclude the writing, editing, preparation of manuscript or reproducible copy of related illustrative materials if required as a part of this contract. They do not apply to the printing or duplicating required by Contractors for their own use in responding to the terms of this contract.

PRINTING B-13

Reference

HEW—315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To restrict the amount of printing or reproduction done under a Government contract.

Comment

1. **"Printing"** is defined by Title I of the Government Printing and Binding Regulations to include and apply to
   a. The processes of composition, print making, press work, binding, and microform
   b. The equipment used in such processes
   c. The end items produced by such processes and equipment
2. **Restrictions on Printing**
   Unless otherwise specified in the contract, the Contractor **may not**
   a. **Engage in** any printing, or
   b. **Subcontract for** any printing in connection with the performance of work under the contract.
3. **Limited Exception**
   The Contractor, however, may, in the performance of any requirement of the Contract, reproduce less than
   a. 5,000 units of any one page **or**
   b. A total of 25,000 units aggregate of multiple pages where a unit is one side of one sheet measuring 8 by 10½ inches in one color.

Flow Down

Not required.

Special Notes

1. ''Composition'' includes type setting and final copy prepared by any method used as a substitute for type setting with such material as procured commercially or produced in authorized printing plants for use in the production of printing or a printing plate.
2. The Contractor should only provide more sophisticated data or printed formats, e.g. multi-color or larger than 8 by 10½ inches, when the contract so specifically provides.

RESTRICTIONS ON PRINTING B-14

References

ASPR — AF Supplement AF 7-5000.6 (1974 JUN)

Source Of Clause

Regulation

Purpose Of Clause

To place a ceiling on the number of copies which may be made under a research contract requirement in order to promote the use of commercial printers for large copy requirements.

Comment

B-14

B-15 STANDARDS OF WORK

The Contractor agrees that the performance of work and services, pursuant to the requirements of this contract, shall conform to high professional standards.

1. **The Basic Restriction** B-14

   IF

   the contract requires the Contractor to supply duplicates of reports, data, or other written material,

   THEN

   it may make **no more than**

   a. 5,000 ''production units'' of a single page **AND**
   b. an aggregate of 25,000 ''production units'' for multi-page material

2. **A "production unit"** is each copy of

   a. one side of
   b. one sheet measuring 11 x 17'' or less
   c. in one color

3. **Excess Duplication**

   To make more than the permitted number of copies, the Contractor must obtain **specific prior written** authorization from the Contracting Officer. The Contracting Officer, however, will normally satisfy the excess duplication needs by obtaining printing support from a commercial printer through the Government Printing Office

4. **Exceptions**

   This restriction does not

   a. preclude any **writing**, **editing**, or **preparation** of manuscript or reproducible copy of related illustrative materials required by the contract.
   b. apply to **printing** or **duplicating** required **for the Contractor's own use** in performing the contract.

Flow Down

Not Required.

Special Notes

None.

STANDARDS OF WORK

B-15

Reference

ASPR 7-402.4 (1959 FEB)

Source Of Clause

Regulation

Purpose Of Clause

To require that research and development activities performed under the contract conform to high professional standards.

Comment

1. The Contractor agrees that work performed and services rendered unde[illegible]e contract shall meet ''high professional standards.''
2. Work under the contract that conforms to ''high professional standards'' may be taken to mean work that reflects a caliber of work representative of the best efforts put forth by members of a given profession in similar activities.
3. The consequences of failure to conform to such standards are unstated, but the Contracting Officer could conceivably

   a. Terminate the contract as provided in the ''termination'' clause and/or
   b. Determine that the costs incurred are not allowable under the ASPR Cost Principles (15-303.3) and refuse to pay the Contractor for his expenditures.

Flow Down

Not required. However, the Contractor's responsibility to perform work of a high professional caliber extends to work under a subcontract.

Special Notes

None.

SECTION C
CHANGES

C-1 ALTERATIONS IN CONTRACT (1949 JUL)

The following alterations have been made in the provisions of this contract:

C-2 CHANGES

The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following:

(a) Drawings, designs, or specifications; (b) method of shipment or packing; (c) place of inspection, delivery, or acceptance; and (d) the amount of Government-furnished property. If any such change causes an increase or decrease in the estimated cost of, or the time required for performance of this contract, or otherwise affects any other provisions of this contract, whether changed or not by any such order, an equitable adjustment shall be made (a) in the estimated cost or delivery schedule, or both, and (b) in such other provisions of the contract as may be so affected, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change: **Provided, however**, That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled, ''Disputes.'' However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

ALTERATIONS IN CONTRACT

C-1

References

ASPR 7-404.2 incorporates 7-105.1 (1949 JUL)
FPR 1-7.204-1

Source Of Clause

Regulation

Purpose of Clause

To provide for recognition of any deletions, changes or other modifications that are made in referenced contract documents.

Comment

1. This clause is used when the contract refers to a standard form or other document which has, as a result of negotiation, been altered. It is included in the contract before the parties sign it and it sets forth and describes any
   a. deletions,
   b. changes, or
   c. other modifications

   to any document that may have been made a part of the contract by reference.
2. If this clause is not contained in a contract together with an enumeration of such alterations that may have been made in referenced documents, then no
   a. prior, or
   b. contemporaneous oral agreement

   omitted from the contract may be legally or administratively recognized.

Flow Down

Not Required.

Special Notes

None.

CHANGES

C-2

Reference

HEW-315 (Rev. 12/72)

Source Of Clause

Regulation

Purpose Of Clause

To give the Government the unilateral right to make changes in certain aspects of the work to be done under the contract. To set up a procedure for adjusting contract costs or due dates affected by such a change.

Comment

1. Only the Contracting Officer may make changes in the contract. His change order
   a. Must be written
   b. May be made without notice to the sureties

C-2

C-3 CHANGES (1967 APR)

(a) The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following:

(i) drawings, designs, or specifications;
(ii) method of shipment or packing; and
(iii) place of inspection, delivery, or acceptance.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, or otherwise affects any other provision of this contract, an equitable adjustment shall be made:

(i) in the estimated cost or delivery schedule, or both;
(ii) in the amount of any fixed fee to be paid to the Contractor; and
(iii) in such other provisions of the contract as may be affected, contract shall be modified in writing accordingly.

Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change; **provided,** however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled ''Disputes.'' However, except as provided in paragraph (c) below, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(c) Notwithstanding the provisions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance thereof, shall not be increased or deemed to be increased except by specific written modification of the contract indicating the new contract estimate cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until such modification is made, the

C-2

   c. Must be for changes ''within the general scope'' of the contract.

2. The Contracting Officer may change only the
   a. Drawings, designs, specifications
   b. method of shipment or packing
   c. Places of inspection, delivery, and acceptance,
   d. Amount of Government furnished property.
3. The change may **affect**
   a. The estimated cost of the contract (increase or decrease),
   b. The time required to perform the contract,
   c. Any other provision of the contract.

But the change itself will **not** automatically change any other part of the contract.

4. The Contractor may claim an adjustment in the contract because of the change. He must
   a. Assert his claim within 30 days of the date of **receipt** of the change order,
   b. Put his claim in writing.
5. The Contracting Officer may act only on a claim for adjustment asserted **prior** to final payment under the contract.
6. If there is a failure to agree on an equitable **adjustment**
   a. It shall be a dispute concerning a question of fact under the ''Disputes'' clause.
   b. The Contractor must continue work under the contract as changed.

Flow Down

Not required.

Special Notes

1. Neither a **non-written** claim for adjustment nor a claim submitted after 30 days from receipt of the change order will automatically bar the Contractor but it is strongly suggested that he put his claim in writing and submit it within 30 days.
2. The Contractor is not told what he may do if he believes an alleged change order is not within the general scope of the contract, or within one of the 4 listed categories. Whether he must continue work in this situation may be a question for the courts.

CHANGES

C-3

References

ASPR 7-404.1 (1967 APR)
FPR 1-7.202-2

Source Of Clause

Regulation

Purpose Of Clause

To give the Government the unilateral right to make changes in certain aspects of the work to be done under the contract. To set up a procedure for adjusting contract costs or due dates affected by such a change.

Comment

1. The Contracting Officer has the right to make changes **at any time** during contract performance. His change order
   a. must be written
   b. may be made without notice to any of the Contractor's sureties

C-3 Contractor shall not be obligated to continue performance or incur costs beyond the point established in the clause of this contract entitled ''Limitation of Cost'' or ''Limitation of Funds.''

C-4 STOP WORK ORDER (1971 APR)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of ninety (90)* days after the order is delivered to the Contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a Stop Work Order issued pursuant to this clause. Upon receipt of such an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of ninety (90)* days after a stop work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either:

c. must only be for changes ''within the general scope'' of the contract. **C-3**

2. The Contracting Officer may change any one or more of
   a. drawings, designs, or specifications
   b. method of shipment of packing
   c. place of inspection, delivery, or acceptance.
3. A change made in one part of the contract **will not automatically change other parts** of the contract that may be affected.
4. **IF**

   the Contractor thinks that some other part of the contract should be changed,

   THEN

   it may claim an ''equitable adjustment''. Such an adjustment
   a. may be to
      1. the **estimated cost** of the contract
      2. the delivery schedule, or
      3. any other provision of the contract.
   b. must be asserted
      1. within 30 days of the **date of receipt** of the change order, and
      2. in writing.
5. The Contracting Officer may act **only** on a claim for adjustment asserted **prior** to final payment under the contract.
6. if there is a failure to agree on an adjustment
   a. It shall be a dispute concerning a question of fact under the ''Disputes'' clause
   b. The Contractor **must** continue work under the contract as changed **UNLESS AND UNTIL** The contract is completed or the Contractor reaches the cost limit established in the ''Limitation of Cost'' or ''Limitation of Funds'' clauses.

Flow Down

Not required.

Special Notes

1. **Neither** a nonwritten claim for adjustment **nor** a claim submitted after 30 days from receipt of the change order will **automatically** bar the Contractor from getting an adjustment. However, it is strongly suggested that it put its claim in writing and submit it within 30 days.
2. The Contractor is not told what he may do if he believes an alleged change is **not** ''within the general scope'' of the contract. Whether he **must** continue work in this situation **may** be a question for the courts.
3. The 30 day period for claiming an adjustment may be varied by departments operating under the ASPR.
4. If a change order will result in a change expected to exceed $100,000, the Contracting Officer will require the Contractor to furnish a ''Certificate'' of current cost or pricing data unless the price is based on
   a. adequate price competition
   b. established catalogue or market prices of commercial items sold in substantial quantities to the general public
   c. law or regulation (see also the clauses dealing with price reductions found in ASPR 7.104-29).

STOP WORK ORDER

C-4

Reference

ASPR 7-404.5 incorporates 7-105.3 (1971 APR) as modified by 7-205.6

Source of Clause

Regulation

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(i) cancel the stop work order, or

(ii) terminate the work covered by such order as provided in the ''Default'' or the ''Termination'' clause of this contract.

(b) If a stop work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. An equitable adjustment shall be made in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other provisions of the contract that may be affected, if:

(i) The stop work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract, and

(ii) The Contractor asserts a claim for such adjustment within thirty (30) days after the end of the period of work stoppage; **provided** that, if the Contracting Officer decides the facts justify such action, he may receive and act upon any such claim asserted at any time prior to final payment under this contract.

(c) If a stop work order is not canceled and the work covered by such order is terminated for the convenience of the Government, the reasonable costs resulting from the stop work order shall be allowed in arriving at the termination settlement.

(d) If a stop work order is not canceled and the work covered by such order is terminated for default, the reasonable costs resulting from the stop work order shall be allowed by equitable adjustment or otherwise.

*The clause may provide for less than ninety (90) days.

Purpose of Clause

To provide a course of action intermediate to termination on the one hand, and unabated continuance of work on the other, thus allowing a termination decision to be made while avoiding the risk of either an inconvenient or inappropriate termination or wasteful continuance of work until a termination ultimately occurs.

Comment

1. **Use of stop work orders**

   Normally, stop work orders will be issued only **after** efforts to reach a supplemental agreement to suspend work have failed. In all cases, stop work orders are issued **only after** prior approval by a Government official at a level higher than the Contracting Officer.

2. **The Stop Work Order**

   a. must be specifically identified as such
   b. must be in writing
   c. must be issued by the Contracting Officer
   d. shall be for 90 days from the date the order is delivered to the Contractor, or a specified lesser period, and may be extended by an agreement between the Contractor and the Contracting Officer
   e. may require that all or part of the work is to be stopped
   f. must clearly describe the work which is to be stopped
   g. should include suggestions to the Contractor on how to minimize costs, including especially
      i. instruction as to the issuance of further orders for materials or services
      ii. guidelines as to action to be taken on subcontracts already entered into.

3. **After receiving a stop work order, the Contractor**

   a. may discuss the stop work order with the Contracting Officer with a view to its modification
   b. shall nevertheless
      i. comply with its terms
      ii. take all reasonable steps to minimize costs allocable to the work covered by the order.

4. **Contracting Officer's duties during the stop work period**

   The Contracting Officer should, when proper,

   a. cancel the stop work order, or
   b. terminate the work covered by the stop work order.

5. **Resumption of work**

   The Contractor shall immediately resume work if the stop work order

   a. is cancelled, or
   b. expires without a notice of termination being given

6. **Adjustments and modifications**

   IF

   a. the stop work order resulted in an increase in
      i. the time required to complete the contract, or
      ii. the cost properly allocable to the contract **AND**
   b. the Contractor asserts a claim within **30 days** of resuming work.

   THEN

   a. An equitable adjustment shall be made in
      i. the contract's delivery schedule
      ii. the contract's estimated cost
      iii. any other affected provision of the contract, or
      iv. any combination thereof

   AND

   b. the contract shall be modified accordingly, in writing.

7. **Termination of the work**

   IF

   work is stopped because of a termination

THEN

reasonable costs resulting from the stop work order shall be allowed

a. in the termination settlement, **if** the termination is for the convenience of the Government
b. by equitable adjustment or otherwise, **if** the termination is for default.

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Not required. However, the Contractor may wish to protect itself against stop work orders in its subcontracts. Otherwise, it may be liable to Subcontractors for costs which it will not be able to recover from the Government.

Special Notes

1. This clause is not required in all Government contracts. It may be used when there is a prospect that
    a. advancements in the state of the art,
    b. breakthroughs in engineering or production, **OR**
    c. realignment of Government programs may occur.

    These circumstances may give rise to situations where the choice between termination, issuance of a change order under the ''Changes'' clause, and continued contract performance is unclear. A stop work order permits suspension of contract work pending a decision.
2. If he considers it justified, the Contracting Officer, at any time prior to the final payment under the contract, may consider and act upon claims for adjustment which were not made within the required 30 day period.
3. Even during a stop work order, the Contractor must comply with the provisions of the ''Limitation of Cost'' clause, especially those which require notification of potential cost overruns.
4. The Contractor probably does not need to be as stringent in limiting costs after a stop work order as when a termination notice has been received or when further expenditures would exceed estimated cost. However, it would be safer to take the same measures as if termination had occurred, except where there is a specific indication from the Contracting Officer that such action is not necessary.

SECTION D
REIMBURSEMENT UNDER CONTRACT

D-1 ACCOUNTS, AUDIT, AND RECORDS

(a) The Contractor shall maintain books, records, documents, and other evidence, accounting procedures, and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. The foregoing constitutes ''records'' for the purposes of this clause.

(b) The Contractor 's facility(ies) or such part thereof as may be engaged in the performance of this contract, and his records shall be subject at all reasonable time to inspection and audit by the Contracting Officer or his authorized representatives.

(c) The Contractor shall preserve and make available his records (1) until the expiration of 3 years from the date of final payment under this contract, or the time periods for the particular records specified in 41 CFR Part 1-20, whichever expires earlier, and (2) for such longer period, if any, as is required by applicable statute, or by other clauses of this contract, or by (i) or (ii) below:

(i) If this contract is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of 3 years from the date of any resulting final settlement.

(ii) Records which relate to (A) appeals under the ''Disputes'' clause of this contract, (B) litigation or the settlement of claims arising out of the performance of this contract, or (C) costs and expenses of this contract to which exception has been taken by the Contracting Officer or any of his duly authorized representatives, shall be retained until such appeals, litigation, claims, or exceptions have been disposed of.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract hereunder that is not firm fixed-price or fixed-price with escalation. When so inserted, changes shall be made to designate the higher-tier Subcontractor at this level involved in place of the Contractor; to add ''of the Government prime contract,'' in place of ''this contract'' in (B) of subparagraph (c)(ii) above.

D-2 ALLOWABLE COST

(a) **Compensation for Contractor's performance.** Payment for the allowable cost, as herein defined and as actually incurred by the Contractor, shall constitute full and complete compensation for the performance of the work under this contract.

(b) **Allowable cost.** The allowable cost of performing the work under this contract shall be the cost actually incurred by the Contractor, either directly incident or properly allocable to the contract, in the performance of this contract in accordance with its terms. The allowable cost, direct and indirect, including acceptability of cost allocation methods, shall be determined by the Contracting Officer in accordance with:

(1) Subpart 1-15.3 of the Federal Procurement Regulations (41 CFR 1-15.3) as in effect on the date of this contract.

(2) The terms of this contract.

ACCOUNTS, AUDIT, AND RECORDS

Reference
HEW-315 (Rev. 12/72)

Source of Clause
Regulation

Purpose of Clause

To require the Contractor and all Subcontractors to keep and make available records in support of costs.

Comment

The Contractor must

1. Properly document all direct and indirect contract costs incurred or anticipated. This was implied by the "Payment" and "Examination of Records" clauses.
2. Give the Government the right to make reasonable inspection of his facilities used for and his records of the contract. This was also required in the "Inspection" clause.
3. Make his records (including those relating to work terminated) available for Government examination, as required by
   a. The "Examination of Records" clause
   b. Any other clause in the contract.

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Required at all tiers.

Special Notes

None.

ALLOWABLE COST

Reference
HEW-315 (Rev. 12/72)

Source of Clause
Regulation

Purpose of Clause

To limit Government payment to only those allowed costs which are actually incurred during the performance of the contract, and to define what costs a Contractor is allowed to incur.

Comment

1. Allowable cost for a contract is (generally)
   a. Direct costs of the contract
   b. The overhead
   c. Less any credits (discounts, rebates, etc.) obtainable by the Contractor during performance of the contract.
2. To be considered an allowable cost, a cost must be
   a. Reasonable
   b. Allocable to the contract

D-2

D-3 ALLOWABLE COST, FIXED FEE, AND PAYMENT (1974 APR)

(a) For the performance of this contract, the Government shall pay to the Contractor:

(i) the cost thereof (hereinafter referred to as ''allowable cost'') determined by the Contracting Officer to be allowable in accordance with:

(A) Part 3 of Section XV of the Armed Services Procurement Regulation as in effect on the date of this contract; and

(B) the terms of this contract; and

(ii) such fixed fee, if any, as may be provided for in the Schedule.

(b) Payments shall be made to the Contractor when requested as work progresses, but not more frequently than bi-weekly, in amounts approved by the Contracting Officer. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as such representative may require, an invoice or public voucher supported by a statement of cost for the performance of this contract and claimed to constitute allowable cost. For this purpose, except as provided herein with respect to pension contributions, the term **"costs"** shall include only those recorded costs which result, at the time of the request for reimbursement, from payment by cash, check, or other form of actual payment for items or services purchased directly for the contract, together with (when the Contractor is not delinquent in payment of costs of contract performance in the ordinary course of business) costs incurred, but not necessarily paid, for materials which have been issued from the Contractor's stores inventory and placed in the production process for use on the contract, for direct labor, for direct travel, for other direct inhouse costs, and for properly allocable and allowable indirect costs, as is shown by records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts plus the amount of progress payments which have been paid to Contractor's Subcontractors under similar cost standards. In addition, when pension contributions are paid by the Contractor to the retirement fund less frequently than quarterly, accrued costs therefor shall be excluded from indirect costs for payment purposes until such costs are paid. If pension contributions are paid on a quarterly or more frequent basis, accruals therefor may be included in indirect costs for payment purposes **provided** that they are paid to the fund within thirty (30) days after the close of the period covered. If payments are not made to the fund within such thirty-day period, pension contribution costs shall be excluded from indirect cost for payment purposes until payment has been made. The restriction on payment more frequently than bi-weekly and the requirement of prior payment for items or services purchased directly for the contract shall not apply where the Contractor is a small business concern.

(c) Promptly after receipt of each invoice or voucher and statement of cost, the Government shall, except as otherwise provided in this contract, subject to the provisions of (d) below, make payment thereon as approved by the Contracting Officer. After payment of an amount equal to eighty percent (80%) of (the Government's share of) the total estimated cost of performance of this contract set forth in the schedule, the Contracting Officer may withhold further payment on account of allowable cost until a reserve shall have been set aside in an amount which he considers necessary to protect the interests of the Government, but such reserve shall not exceed one percent (1%) of (the Government share of) such total estimated cost or ten thousand dollars (10,000), whichever is less.

(d) At any time or times prior to final payment under this contract, the Contracting Officer may have the invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by the Contracting Officer, on the basis of such audit, not to constitute allowable cost. Any payment may be reduced for overpayments, or increased for underpayments, on preceding invoices or vouchers.

(e) On receipt and approval of the invoice or voucher designated by the Contractor as the ''completion invoice'' or ''completion voucher'' and upon compliance by the Contractor with all the provisions of this contract (including, without limitation, the provisions relating to patents and the provisions of (f) below), the Government shall promptly pay to the Contractor any balance of allowable cost, and any part of the fixed fee, which has been withheld pursuant to (c) above or otherwise not paid to the Contractor. The completion invoice or voucher shall be submitted by the Contractor promptly following completion of the work under this contract but in no event later than one (1) year (or such longer period as the Contracting Officer may in his discretion approve in writing) from the date of such completion.

   - c. Consistent with GAAP (Generally Accepted Accounting Principles)
   - d. In conformity with the principles of the contract.

3. The Contracting Officer determines the allowable cost. To do so, he uses
   - a. FPR §1-15.3 (FMC 73-8)
   - b. The terms of the contract.

Flow Down

Not Required

Special Notes

None.

ALLOWABLE COST AND PAYMENT

References

ASPR 7-402.3 (a) incorporates 7-203.4 (a) (1974 APR)
FPR 1-7.202-4

Source of Clause

Regulation

Purpose of Clause

To define the costs a Contractor is allowed to incur. To indicate the conditions for payment of allowable costs.

Comment

Allowable Cost

1. Allowable cost is (generally)
   - a. Direct costs of the contract
   - b. Overhead (indirect cost)
   - c. Less any credits (discounts, rebates, etc.) obtained by the Contractor during performance of the contract.
2. To be considered an allowable cost, a cost must be
   - a. Reasonable
   - b. Allocable to the contract
   - c. Consistent with GAAP (Generally Accepted Accounting Principles)
   - d. In conformity with the principles of the contract.
3. The Contracting Officer determines the allowable cost. To do so, he uses
   - a. ASPR 15-3 or FPR 1-15.3 (FMC 73-8)
   - b. The terms of the contract.

Payment

1. **For periodic payment** the Contractor submits

   A reasonably detailed voucher supported by a statement of cost. When the voucher is approved by the Contracting Officer, payment is promptly made.
2. **Vouchers may be audited** at any time to final payment — A periodic payment may be
   - a. Reduced for a prior overpayment
   - b. Increased for a prior underpayment
3. **To get final payment,** the Contractor must
   - a. Submit a completion invoice to the Contracting Officer within 1 year of completion.

D-3 (f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the Contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the Contracting Officer. Prior to final payment under this contract, the Contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(i) an assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates credits, or other amounts (including any interest thereon) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) a release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(A) specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor;

(B) claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract; **provided,** that such claims are not known to the Contractor on the date of the execution of the release; and **provided further** that the Contractor gives notice of such claims in writing to the Contracting Officer not more than six (6) years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier; and

(C) claims for reimbursement of costs (other than expenses of the Contractor by reason of his indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents.

(g) Any cost incurred by the Contractor under the terms of this contract which would constitute allowable cost under the provisions of this clause shall be included in determining the amount payable under this contract, notwithstanding any provisions contained in the specifications or other documents incorporated in this contract by reference, designating services to be performed or materials to be furnished by the Contractor at his expense or without cost to the Government.

Editor's note: The clause reproduced above includes changes in paragraph (c) which is permitted by 7-402.3 (c).

D-4 AUDIT BY DEPARTMENT OF DEFENSE (1974 APR)

(a) **General.** The Contracting Officer or his representatives shall have the audit and inspection rights described in the applicable paragraphs (b), (c) and (d) below.

(b) **Examination of Costs.** If this is a cost reimbursement type, incentive, time and materials, labor hour, or price redeterminable contract, or any combination thereof, the Contractor shall maintain, and the Contracting Officer or his representatives shall have the right to examine books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. Such right of examination shall include inspection at all reasonable times of the Contractor's plants, or such parts thereof, as may be engaged in the performance of this contract.

(c) **Cost or Pricing Data.** If the Contractor submitted cost or pricing data in connection with the pricing of this contract or any change or modification thereto, unless such pricing was based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation, the Contracting Officer or his representatives who are employees of the United States Government shall have the right to examine all books, records, documents and other data of the Contractor related to the negotiation, pricing or performance of such contract, change or modification, for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. Additionally, in the case of pricing any change or modification exceeding $100,000 to formally advertised contracts, the Comptroller General of the United States or his representatives who are employees of the United States Government shall have such rights. The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

(d) **Reports.** If the Contractor is required to furnish Cost Information Reports (CIR) or Contract Fund Status Reports (CSFR), the Contracting Officer or his representatives shall have the right to examine books, records, documents, and supporting materials, for the purpose of evaluating (i) the effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports, and (ii) the data reported.

(e) **Availability.** The materials described in (b), (c) and (d) above shall be made available at the office of the Contractor, at all reasonable times, for inspection, audit, or reproduction, until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M of the Armed Services Procurement Regulation, and for such longer period, if any, as is required by applicable statute, or by other clauses of this contract, or by (1) and (2) below:

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for a period of three years from the date of any resulting final settlement.

b. Release, with a few exceptions, any of his claims against the Government arising under the particular contract. D-3

c. Assign any of his credits (such as discounts, rebates, etc.) arising from expenditures on this contract to the Government.

Flow Down

Not required.

Special Notes

1. Normally, the Contracting Officer will withhold 1% of total estimated cost or $10,000, whichever is less, after 80% of the total estimated cost has been paid to the Contractor. However, this provision may be eliminated by negotiation in contracts with educational institutions under ASPR 7-402.3 (c) (8).
2. The FPR clause does not include the portion of subparagraph (1) dealing with pension contributions.

AUDIT BY THE DEPARTMENT OF DEFENSE D-4

Reference

ASPR 7-402.30 incorporates 7-104.41(a) (1974 APR)

Source of Clause

Regulation required by the Armed Services Procuremment Act, 10 U.S.C. 2306(f) (Also known, for this particular section, as the Truth in Negotiation Act, 76 Stat. §528, (1962), as amended by 82 Stat. §863 (1970).

Purpose of Clause

To give the Defense Department the right to audit and otherwise examine documents and other data held by Government Contractors or Subcontractors relating to their performance under the contract or subcontract.

Comment

1. **The Contractor's Duty to Maintain Books, Records, etc.**

The Contractor must maintain books, records, documents, and other evidence as well as accounting procedures and practices sufficient to reflect properly **all costs** (direct and indirect) **for which reimbursement has been or will be sought.**

2. **The Contracting Officer's Right to Examine**

The Contractor agrees to allow the Contracting Officer, **or his representatives** to examine

a. Any of the books, records, etc. justifying requests for reimbursement (maintained as required above), and

b. **All** books, records, documents, supporting materials, and other data of the Contractor, in order to evaluate

i. The accuracy, currency, and completeness of **any** submitted cost or pricing data (including

D-4 (2) Records which relate to appeals under the ''Disputes'' clause of this contract, or litigation or the settement of claims arising out of the performance of this contract, shall be made available until such appeals, litigation, or claims have been disposed of.

(f) The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph (f), in all subcontracts exceeding $2,500 hereunder, except altered as necessary for proper identification of the contracting parties and the Contracting Officer under the Government prime contract.

D-5 COST ACCOUNTING STANDARDS (1974 NOV)

(a) Unless the Cost Accounting Standards Board has prescribed rules or regulations exempting the Contractor or this contract from standards, rules, and regulations promulgated pursuant to 50 U.S.C. App. 2168 (Public Law 91-379, August 15, 1970), the Contractor, in connection with this contract shall:

(1) By submission of a Disclosure Statement, disclose in writing his cost accounting practices as required by regulations of the Cost Accounting Standards Board. The required disclosures must be made prior to contract award unless the Contracting Officer provides a written notice to the Contractor authorizing post-award submission in accordance with regulations of the Cost Accounting Standards Board. The practices disclosed for this contract shall be the same as the practices currently disclosed and applied on all other contracts and subcontracts being performed by

computations and projections used therein).

ii. Data reported in Contract Fund Status Reports (CFSR) or Cost Information Reports (CIR), **AND**

iii. The Contractor's methods of compiling the data for its CFSRs and CIRs.

The right of examination **includes** the right to inspect, audit, or reproduce any of the books, records, etc. of the Contractor.

3. **The Contractor's Duty to Keep Its Books, Records, Etc. Available for Examination.**

The books, records, etc, which the Contracting Officer or his representatives are allowed to examine shall be maintained and made **available at the Contractor's** office, at all reasonable times, **until**

a. **Three years from** the date of the final payment under the contract.

b. **Three years from** the final settlement for terminated work (for that part of the contract which is terminated).

c. **Appeals** under the ''Disputes'' clause have been resolved.

d. The **litigation** or **settlement of claims** arising from contract performance has been concluded.

e. The end of period specified in **Appendix M** of the ASPR (if such period is less than three (3) years e.g., two (2) years for petty cash records, clock cards, and cancelled checks for employees' services) or

f. Such greater periods as may be required by law or by other provisions of the contract.

4. **Plant Inspection**

The Contractor must also allow the Contracting Officer or his representatives to **inspect,** at all reasonable times, all or any part of the Contractor's **plants that are engaged in the performance of the Contract.**

Flow Down

Required. This clause must be included in all subcontracts at all tiers, if such subcontracts exceed $2,500.

Special Notes

1. This clause is not required in formally-advertised contracts for less than $100,000. However, in formally-advertised contracts **exceeding** $100,000, books, records, etc. relating to the accuracy, currency, and completeness of cost or pricing data (including computations and projections used therein) submitted in regard to any changes or modifications exceeding $100,000 may **also** be examined by the **Comptroller General** or his representatives.

   Otherwise, the right of the Comptroller General (as **distinct** from the right of the Defense Department) is as specified in the ''Examination of Records'' clause under 10 U.S.C. §2313(a) (1970).

2. The Contractor does not have to maintain books, records, etc. relating to the accuracy, currency, and completeness of cost or pricing data **IF** such costs or prices were based on

   a. Adequate price competition, or

   b. Established catalogue or market prices of commercial items sold in substantial quantities to the general public, or

   c. Law or regulation.

3. Contract Funds Status Reports provide information about the contract's cost, scheduling, and funding performance. They aid the Department of Defense in

   a. Updating and forecasting contract fund requirements

   b. Planning and deciding funding changes

   c. Developing fund requirements and budget estimates in support of approved programs, and

   d. Discovering funds in excess of contract needs.

COST ACCOUNTING STANDARDS

D-5

Reference

ASPR 7-403.50 incorporates 7-104.83 (1974 NOV)

Source of Clause

Regulation pursuant to the Defense Production Act of 1950, as amended; 50 U.S.C. §2168, 84 Stat. §796.

the Contractor and which contain this Cost Accounting Standards clause. If the Contractor has notified the Contracting Officer that the Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential, the Disclosure Statement will be protected and will not be released outside the Government.

(2) Follow consistently the cost accounting practices disclosed pursuant to (1) above in accumulating and reporting contract performance cost data concerning this contract. If any change in disclosed practices is made for purposes of any contract or subcontract subject to Cost Accounting Standards Board requirements, the change must be applied prospectively to this contract, and the Disclosure Statement must be amended accordingly. If the contract price or cost allowance of this contract is affected by such changes, adjustment shall be made in accordance with subparagraph (a)(4) or (a)(5) below, as appropriate.

(3) Comply with all Cost Accounting Standards in effect on the date of award of this contract or if the Contractor has submitted cost or pricing data, on the date of final agreement on price as shown on the Contractor's signed certificate of current cost or pricing data. The Contractor shall also comply with any Cost Accounting Standard which hereafter becomes applicable to a contract or subcontract of the Contractor. Such compliance shall be required prospectively from the date of applicability to such contract or subcontract.

(4)(A) Agree to an equitable adjustment as provided in the changes clause of this contract if the contract cost is affected by a change which pursuant to (3) above, the Contractor is required to make to his established cost accounting practices whether such practices are covered by a Disclosure Statement or not.

(B) Negotiate with the Contracting Officer to determine the terms and conditions under which a change to either a disclosed cost accounting practice or an established cost accounting practice, other than a change under (4)(A) above, may be made. A change to a practice may be proposed by either the Government or the Contractor, **provided,** however, that no agreement may be made under this provision that will increase costs paid by the United States.

(5) Agree to an adjustment of the contract price or cost allowance, as appropriate, if he or a Subcontractor fails to comply with an applicable Cost Accounting Standard or to follow any practice disclosed pursuant to subparagraphs (a)(1) and (a)(2) above and such failure results in any increased costs paid by the United States. Such adjustment shall provide for recovery of the increased costs to the United States together with interest thereon computed at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT. 97, or seven percent (7%) per annum, whichever is less, from the time the payment by the United States was made to the time the adjustment is effected.

(b) If the parties fail to agree whether the Contractor or a Subcontractor has complied with an applicable Cost Accounting Standard, rule, or regulation of the Cost Accounting Standards Board and as to any cost adjustment demanded by the United States, such failure to agree shall be a dispute concerning a question of fact within the meaning of the disputes clause of this contract.

(c) The Contractor shall permit any authorized representatives of the head of the agency, of the Cost Accounting Standards Board, or of the Comptroller General of the United States to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.

(d) The Contractor shall include in all negotiated subcontracts which he enters into the substance of this clause except paragraph (b), and shall require such inclusion in all other subcontracts of any tier, except that this requirement shall apply only to negotiated subcontracts in excess of $100,000 where the price negotiated is not based on:

(i) established catalog or market prices of commercial items sold in substantial quantities to the general public, or

(ii) prices set by law or regulation.

NOTE: (1) Subcontractors shall be required to submit their Disclosure Statements to the Contractor. However, if a Subcontractor has previously submitted his Disclosure Statement to a Government Administrative Contracting Officer (ACO) he may satisfy that requirements by certifying to the Contractor the date of such Statement and the address of the ACO.

(2) In any case where a Subcontractor determines that the Disclosure Statement information is privileged and confidential and declines to provide it to his Contractor or higher tier Subcontractor, the Contractor may authorize direct submission of that Subcontractor's Disclosure Statement to the same Government offices to which the Contractor was required to make submission of his Disclosure Statement. Such authorization shall in no way relieve the Contractor of liability as provided in paragraph (a)(5) of this clause. In view of the foregoing and since the contract may be subject to adjustment under this clause by reason of any failure to comply with rules, regulations, and Standards of the Cost Accounting Standards Board in connection with cover subcontracts, it is expected that the Contractor may wish to include a clause in each such subcontract requiring the Subcontractor to appropriately indemnify the Contractor. However, the inclusion of such a clause and the terms thereof are matters for negotiation and agreement between the Contractor and the Subcontractor, provided that they do not conflict with the duties of the Contractor under its contract with the Government. It is also expected that any Subcontractor subject to such indemnification will generally require substantially similar indemnification to be submitted by his Subcontractors.

(e) The terms defined in Section 331.20 of Part 331 of Title 4, Code of Federal Regulations (4 CFR 331.20) shall have the same meanings herein. As there defined, ''negotiated subcontract'' means ''any subcontract except a firm fixed-price subcontract made by a Contractor or Subcontractor after receiving offers from at least two firms not associated with each other or such Contractor or Subcontractor, providing (1) the solicitation to all competing firms is identical, (2) price is the only consideration in selecting the Subcontractor from among the competing firms solicited, and (3) the lowest offer received in compliance with the solicitation from among those solicited is accepted.''

Purpose of Clause

To promote economy in Government procurement activities by requiring uniformity and consistency in the cost-accounting practices of Government Contractors and Subcontractors.

Comment

1. **Cost Accounting Standards Board**

This Board is empowered by law to establish cost-accounting standards designed **to achieve uniformity and consistency in the cost-accounting principles** followed by defense Contractors and Subcontractors under federal contracts.

2. **Basic Contractor Requirement — Submission of a Disclosure Statement**

a. **The Disclosure Statement**

Created by the Cost Accounting Standards Board to provide for the comprehensive disclosure of a Contractor 's or Subcontractor 's accounting practices and policy, this statement includes disclosure of

- i. The methods used to distinguish direct from indirect costs, and
- ii. The basis used for allocating indirects costs.

b. **The Disclosure Requirement**

In accordance with the regulations of the Cost Accounting Standards Board (the Board), the Contractor must

- i. Submit a Disclosure statement of its accounting practices
  - a. **Prior to** the award of the contract, **OR**
  - b. **Within 90 days after** the award, **if** the Contracting Officer makes a **written** finding that such an authorization is essential
    - 1. To the national defense
    - 2. Because of the public exigency, **OR**
    - 3. To avoid undue hardship.
- ii. Disclose accounting practices consistent with those disclosed and practiced on **all** of the Contractor 's other Government contracts or subcontracts.

c. **Protection of Trade Secrets and Confidential Information**

IF

the Contractor wants its Disclosure Statement

- i. Protected, and
- ii. Not released outside of the Government

THEN

it must **notify** the Contracting Officer that it contains

- i. Trade secrets
- ii. Privileged and Confidential commercial or financial information.

3. **Compliance Requirements**

The Contractor must

a. **Comply with all Cost Accounting Standards**

- i. In effect
  - a. On the date of the award of the contract, **OR**
  - b. On the date of the final agreement on price shown on the Contractor 's signed Certificate of Current Cost or Pricing Data, **IF** the Contractor has submitted such data.
- ii. Which subsequently become applicable to a contract or subcontract, such compliance being required **prospectively** from the date of applicability.

b. Consistently adhere, in the accumulation and reporting of contract performance cost data, to the **Cost-Accounting Practices**

- i. Disclosed in the original Disclosure Statement, and
- ii. As later changed for **any** contract or subcontract subject to the Cost Accounting Standards Board 's Requirements
  - a. Must be applied prospectively

b. Must be incorporated into an **Amended** Disclosure Statement, as negotiated by the Contractor and Contracting Officer.

4. **Adjustments to the Contract-Incorporating the "Changes" Clause**

IF

due to changes to the Cost Accounting Standards by the Board

a. Changes are required in established accounting practices, whether covered by the Disclosure Statement or not, **AND**

b. The contract cost is affected by such changes.

THEN

the Contractor must agree to equitable adjustments, as provided in the ''Changes'' clause,

a. In the contract's estimated cost or delivery schedule, or both

b. In the amount of any fixed fee to be paid to the Contractor, and

c. In such other provisions of the contract as may be affected.

5. **Enforcement**

a. Examining Records

The Contractor must permit any authorized representative of the

- i. Head of the Agency which grants the contract,
- ii. The Cost Accounting Standards Board, or
- iii. The Comptroller General

to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.

b. Adjustment of the Contract Price

IF

- i. The Contractor **or Subcontractor** fails to comply with
  - a. The applicable Cost Accounting Standards, or
  - b. The Cost Accounting practices stated in the original or amended Disclosure Statement, and
- ii. Such a failure results in increased costs to the Government.

THEN

the **Contractor** must agree to an adjustment of the contract price cost allowance, as appropriate. Such adjustment shall provide for

- i. Recovery of increased cost to the Government, and
- ii. Interest thereon, **computed at the lesser of**
  - a. The rate set by the Secretary of the Treasury for the Renegotiation Board pursuant to Public Law 92-41, 85 Stat. §97, or
  - b. 7% per year.

c. Disputes

IF

the parties fail to agree whether the Contractor or Subcontractor has complied with

- i. An applicable Cost Accounting Standard, rule or regulation of the Cost Accounting Standards Board,
- ii. Any cost adjustment required by the Government.

THEN

such failure to agree shall be considered a dispute concerning a question of fact and subject to the ''Disputes'' clause.

Flow Down

1. **Definition of Negotiated Subcontract:** It is any subcontract (except a firm, fixed-price subcontract) made by a Contractor or Subcontractor after receiving offers from at least two firms not associated with each other or such Contractor or Subcontractor **IF**

a. An identical solicitation is made to all competing firms

b. **Price** is the **only** consideration in selecting the Subcontractor, and

c. The lowest offer from the solicitations is accepted.

2. The Contractor is required to include the substance of this clause, except for the provision which makes questions of compliance with the clause subject to the ''Disputes'' clause, in **all** ''negotiated subcontracts'' (at any tier), exceeding $100,000, where the price negotiated **is not** based on
   a. Established catalogue or market prices of commercial items sold in substantial quantities to the general public, or
   b. Prices set by law or regulation.
3. Subcontractors must submit their Disclosure Statements to the Contractor **unless** the Subcontractor
   a. Has previously submitted its Disclosure Statement to a Government Administrative Contracting Officer (ACO) **AND**
   b. Certifies to the Contractor the
      i. Date of such prior statement and
      ii. The address of the ACO
4. Protecting the Subcontractor's Privileged and Confidential Information

   IF

   a. a Subcontractor
      i. Determines that information contained in a Disclosure Statement is privileged and confidential **and**
      ii. Declines to provide it to its Contractor or higher tier Subcontractor

   THEN
   the Contractor may **authorize** direct submission of the Subcontractor's Disclosure Statement to the Government offices to which the Contractor was required to submit its Disclosure Statement.

   b. Such authorization **will not** relieve the Contractor from liability for adjustments in its contract price or cost allowance resulting from the Subcontractor's noncompliance with
      i. The applicable rules, regulations, and standards of the Cost Accounting Standards Board, or
      ii. The practices revealed in the Subcontractor's original and amended Disclosure Statements.
5. Because the Contractor is liable for its Subcontractors' noncompliance with this clause, the Contractor may wish to protect itself by requiring the Subcontractor to indemnify the Contractor. In addition, any Subcontractors may wish to protect themselves in a similar manner concerning their Subcontractors. Such indemnification clauses are permitted as long as they do not conflict with the Contractor's duties to the Government under the contract.

Special Notes

1. The Cost Accounting Standards Board has established threshholds different from those appearing in ASPR which were effective January 1, 1975. The effects of the change:
   a. Contractors and Subcontractors are exempted from Board requirements until they receive a contract **exceeding $500,000** which is not otherwise exempt. On receipt of such a contract, the Contractor or Subcontractor must **comply** with the Board requirements.
   b. Once a Contractor or Subcontractor has entered such a $500,000 contract, it must then comply with the same rules for all **subsequent contracts** covered by the rule **which exceed $100,000.**
   c. The ''Cost Accounting Standards'' clause will continue to appear in all contracts and subcontracts exceeding $100,000.

   The Board has indicated that defense procurement agencies may modify outstanding contracts to exempt them from Board requirements when such compliance would not be required if the contracts had been awarded after January 1, 1975. 39 F.R. 44389
2. The Cost Accounting Standards Board only has jurisdiction over certain national defense procurements:

   all negotiated contracts and subcontracts exceeding the threshhold amount which are **NOT:**
   i. awarded pursuant to Small Business Restricted Advertising
   ii. awarded pursuant to Partial Small Buiness Set-Aside
   iii. awarded pursuant to the authority of §8(a) of the Small Business Act, 15 U.S.C. §637(a)

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D-6 EXAMINATION OF RECORDS BY COMPTROLLER GENERAL (1971 MAR)

(a) This clause is applicable if the amount of this contract exceeds $2,500 and was entered into by means of negotiation, including small business restricted advertising, but is not applicable if this contract was entered into by means of formal advertising.

(b) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

(c) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the Subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of such Subcontractor, involving transactions related to the subcontract. The term ''subcontract'' as used in this clause excludes (i) purchase orders not exceeding $2,500 (ii) subcontracts and purchase orders for public utility services at rates established for uniform applicability to the general public.

(d) The periods of access and examination described in (b) and (c) above for records which relate to (i) appeals under the ''Disputes'' clause of this contract, (ii) litigation or the settlement of claims arising out of the performance of this contract, or (iii) costs and expenses of this contract as to which exception has been taken by the Comptroller General or any of his duly authorized representatives, shall continue until such appeals, litigation, claims or exceptions have been disposed of.

iv. awarded pursuant to the Labor Surplus Area Set-Aside Procedure

v. covered by an exemption or waiver issued by the Cost Accounting Standards Board

vi. executed and performed in their entirety outside the United States, its territories and possessions

AND the prices thereof are **NOT:**

i. based on established catalogue or market prices of commercial items sold in substantial quantities to the general public

OR

ii. set by law or regulation.

3. The Board has made an effort to accommodate situations unique to particular types of Contractors. Educational institutions, subject to the Cost Principles of ASPR 15-3 for research contracts, have received some special treatment in the Disclosure Statement. The accounting activity of an institution must be aware of the Cost Accounting Standards which are applicable as well as the Cost Principles.
4. A disclosed or established cost accounting practice may be changed through negotiation when it will not affect the contract price. Either the Contractor or the Government may initiate the change proposal.
5. The FPR recently added a Cost Accounting Standards clause, however, contracts with educational institutions which are subject to FPR Subpart 1-15.3 (Cost Principles) are exempt from its operation. FPR 1-3.1203 (a) (2) (i).

EXAMINATION OF RECORDS BY COMPTROLLER GENERAL

D-6

References

ASPR 7-402.7 incorporates 7-104.15 (1971 MAR)
FPR 1-7.202-7 incorporates 1-7.103-3
HEW-315 (Rev. 12/72)

Sources of Clause

Armed Services Procurement Act of 1947, 10 U.S.C. §2313(b) (1970), 62 STAT. §21
Federal Property and Administrative Services Act, 41 U.S.C. §254(c) (1970), 65 STAT. §700.

Purpose of Clause

To allow the General Accounting Office to verify reimbursed costs and to promote the discovery of inefficient, wasteful, or illegal practices in the performance of negotiated contracts.

Comment

1. This clause applies to contracts involving more than $2,500 that are entered into by negotiation rather than formal advertising.
2. The Contractor agrees to:
   a. allow the Comptroller General or his representative to examine **directly** pertinent books, documents, papers, and records involving transactions related to the contract and
   b. include in all subcontracts, except as indicated in the Flow Down, a clause committing the Subcontractor to allow the same kind of examination by the Comptroller General or his representative;

for a period usually of 3 years after final payment under the contract or until all litigation claims or appeals have been disposed of.

Flow Down

Required unless the subcontract

1. Is a purchase order not exceeding $2,500.
2. Is a purchase from a public utility at rates established for the general public.

Special Notes

1. The original documents in support of cost for the transportation of things are not required to be kept by

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D-7 EXCESS PROFIT (1957 JUN)

The Contractor agrees that, unless otherwise provided by law, this contract shall be subject to all the provisions of 10 U.S.C. §§2382 and 7300 and shall be deemed to contain all the agreements required by those sections; **provided** however, that this clause shall not be construed to enlarge or extend by contract the obligations imposed by those sections. The Contractor agrees to insert in the subcontracts specified in those sections either the provisions of this clause or the provisions required by those sections.

D-8 FOREIGN TRAVEL

Foreign travel shall not be performed without the prior written approval of the Contracting Officer. As used in this clause "Foreign Travel" means travel outside the United States, its Territories and Possessions, and Canada.

the Contractor or Subcontractor. D-6

2. Some records may be disposed of in less than 3 years after final payment as provided in ASPR Appendix M, FPR Part 1-20

EXCESS PROFIT D-7

Reference

ASPR 7-403.4 incorporates 7-104.11 (1957 JUN)

Source of Clause

Regulation pursuant to 10 U.S.C. §§2382, 7300 (1970) (the Vinson Act of 1934, 48 Stat. §505, as amended).

Purpose of Clause

To prevent ''war profiteering'' by limiting the amount of profit to 12% on aircraft and 10% on naval vessels.

Comment

1. **Inapplicability**

   This clause would normally not be used in a cost-reimbursement type research and development contract without fee, for several reasons.

   a. Since there is no profit at all, there will be no ''excess profit'' (which is defined as **profit** exceeding 12% of total cost for aircraft, and 10% of total cost for naval vessels)

   b. The clause only applies to manufacture or construction of all or part of any complete aircraft or naval vessel, **not** to research or development that leads to such manufacture or construction.

2. **Requirements**

   If applicable, the clause merely incorporates the statutory provisions. The statute's main requirements are that the Contractor agree

   a. to repay any excess profit to the Treasury

   b. to keep his books and facilities open to audit and inspection, and

   c. not to evade the statute by subcontracting

3. This clause is not used in contracts in which less than $10,000 is for the acquisition of all or part of an aircraft or naval vessel.

Flow Down

Required by statute (10 U.S.C. §§2382(a)(5), 7300 (a)(5) (1970), except in subcontracts for less than $10,000. (10 U.S.C. §§2382(g)(2), 7300(g)(2) (1970).

Special Notes

1. A contract or subcontract for scientific equipment used for communication, target detection, navigation or fire control may be exempted from the excess profit clause by the Secretary of the military department involved in the contract.
2. If the excess profit clause is used in a contract which is only partially for the manufacture of an aircraft or a naval vessel, **it should be modified** so that it clearly does not apply to the other parts of the contract.

FOREIGN TRAVEL D-8

Reference

HEW-315 (Rev. 12/72)

D-8

D-9 INTEREST (1972 MAY)

Notwithstanding any other provision of this contract, unless paid within 30 days all amounts that become payable by the Contractor to the Government under this contract (net of any applicable tax credit under the Internal Revenue Code) shall bear interest from the date due until paid and shall be subject to adjustments as provided by Part 6 of Appendix E of the Armed Services Procurement Regulation, as in effect on the date of this contract. The interest rate per annum shall be the interest rate in effect which has been established by the Secretary of the Treasury pursuant to Public Law 92-41; 85 STAT 97 for the Renegotiation Board, as of the date the amount becomes due as herein provided. Amounts shall be due upon the earliest one of (i) the date fixed pursuant to this contract; (ii) the date of the first written demand for payment, consistent with this contract, including demand consequent upon default termination; (iii) the date of transmittal by the Government to the Contractor of a proposed supplemental agreement to confirm completed negotiations fixing the amount; or (iv) if this contract provides for revision of prices, the date of written notice to the Contractor stating the amount of refund payable in connection with a pricing proposal or in connection with a negotiated pricing agreement not confirmed by contract supplement.

Source of Clause

Regulation

Purpose of Clause

To prevent travel abroad at the Government's expense except when determined necessary by the Contracting Officer.

Comment

1. Foreign travel is not an allowable cost unless **each** trip has received separate, specific prior approval. Moreover under this clause, the **written** approval of the **Contracting Officer** is required.
2. Foreign Travel is travel outside of the United States, its territories, and its possessions and Canada.
3. The ''United States'' is the 50 States and the District of Columbia.
4. ''Possessions'' are defined as the Virgin Islands, the Canal Zone, Guam, American Samoa, Wake Island, Midway Island, The Guano Islands, but not Puerto Rico. The ASPR definition includes the Swan Islands, Guantanomo Bay, and Johnston Island, specifically excluding leased bases and trust territories.

Flow Down

Not required. However, the Contractor should not reimburse a Subcontractor for foreign travel without the written approval of the Contracting Officer since such costs would not be allowable under the prime contract.

Special Notes

In addition to the provision in ASPR and FPR that prohibits unapproved travel abroad, the costs principles of both regulations, specifically ASPR 15-309.44(e) and FPR 1-15.309-44(e), require specific prior approval for such travel cost to be recognized as allowable.

INTEREST

References

ASPR 7-403.25 incorporates 7-104.39 (1972 MAY) in accordance with Appendix E 620 and 621.
FPR 1-7.203-15.

Source of Clause

Regulation

Purpose of Clause

To encourage prompt payment of amounts due to the Government by providing for interest charges on those amounts not paid within 30 days after they become due.

Comment

1. **Contractor's Duty to Pay Interest on Amounts Due**

   The Contractor must pay interest on any amount not paid to the Government within 30 days from its due date.

2. **Determination of Amount Due**

   The amount due to the Government by the Contractor will be determined by

   a. **Negotiation,** which may not be unduly prolonged, **OR**

   b. The **Unilateral Determination** of the Government **IF** the Contractor fails to

      i. Furnish information promptly, as required under the contract,

      ii. Negotiate expeditiously (if required to by the contract),

      iii. Agree on fair and reasonable prices within a reasonable time after the beginning of negotiations,

      iv. Promptly sign an interim memorandum evidencing a negotiated pricing agreement, or

v. Promptly execute an appropriate supplemental agreement showing the result of negotiations.

3. **Demand for Amount Due**

a. **At or before the time** of the demand for the amount due, the Contracting Officer must

  i. Make the appropriate decision under the ''Disputes'' clause, **AND**

  ii. Notify the Contractor of its right to appeal the decision.

b. Each demand for payment of an amount due must include

  i. An explanation of the indebtedness

  ii. A statement that interest shall be charged if the amount is not paid within 30 days, **AND**

  iii. Notice to the Contractor that it may submit a proposal for postponement of payment **IF**

    a. Immediate payment is not practical, **OR**

    b. The amount due is disputed.

4. **Computation of Interest**

a. **Rate** of Interest

Interest shall be charged at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT. §97, for the Renegotiation Board (such rates are published in the Federal Register every six months).

b. The **period** for which interest charges shall be made.

Interest shall be charged starting from the date the amount is due.

  i. Such ''due date'' is normally the **earliest of**

    a. The date fixed pursuant to the contract.

    b. The date of the first **written** demand for payment. Consistent with the contract (including a demand resulting from default termination).

    c. The date of transmittal to the Contractor of a proposed supplemental agreement to confirm completed negotiations fixing the amount, **OR**

    d. If the contract provides for revision of prices, the date of written notice to the Contractor stating the amount of refund payable in connection with

      1. A pricing proposal, or

      2. A negotiated pricing agreement not confirmed by contract supplement.

  ii. Such ''due date'' will be **extended** to a later time **IF**

    a. There is **undue delay by the Government** after the stated date of a demand before such demand (or notice) is actually sent, **OR**

    b. There is **undue delay in the mails** or other methods by which such demand, or notice, or supplemental agreement is sent, **OR**

    c. The demand, notice, or supplemental agreement is not in fact received by the Contractor and such non-receipt is not the result of any act or omission by the Contractor.

  This later time will be determined under the particular circumstances of each case.

c. **Type** of Interest

The interest charged on the amount due the Government is simple interest.

5. **Postponing Payment by the Contractor**

a. Request by the Contractor

The Contractor in requesting deferral of payment must supply supporting information.

  i. If a ''Disputes'' appeal is pending, such supporting information may be limited to material explaining the Contractor's financial condition.

  ii. If no appeal is pending, such supporting information must

    a. Explain the Contractor's financial condition.

    b. Cover the Contractor's

      1. Contract backlog

      2. Projected cost receipts and requirements.

    c. Disclose

      1. The feasibility of immediate payment, and

      2. The probable effect of full immediate payment on the Contractor's operations.
- b. Standards for granting a postponement
  - i. When an appeal is pending, deferments until its outcome may be freely granted if
    - a. The Contractor agrees to
      - 1. Diligently prosecute the appeal
      - 2. Repay any amount determined due, with interest.
    - b. Collateral security or provisions to assure payment have been made.
  - ii. When no appeal is pending
    - a. The Contract Financing Office will allow deferral of payments if
      - 1. The Contractor can not pay at once in full, or
      - 2. Full immediate payment would seriously impair the Contractor's ability to continue operations or perform contracts or subcontracts for the national defense.
    - b. Such a deferral must
      - 1. Include covenants and security prudent under the circumstances.
      - 2. Be limited to the shortest time practicable.
      - 3. Require payment of the interest.

6. **Adjustments for Amounts Due and Interest Owed by the Contractor** will be allowed for
   - a. Tax credits to which the Contractor is entitled under the Internal Revenue Code
   - b. Credits resulting from prior over collection or excess withholding by the Government — **for both**
     - i. The overcollected or extra withheld amount, and
     - ii. The interest accrued thereon.
   - c. Any other reduction in the amount due; e.g., that resulting from negotiations or proceedings under the ''Disputes'' clause.

NOTE: Because interest is a charge for the use or forbearance of money, whenever the amount of indebtedness is reduced, **interest is chargeable only on the amount finally determined to be due.**

7. **Compromise or Termination of the Amount Due**

   IF

   a claim of indebtedness
   - a. Has not been referred to another agency for collection,
   - b. Does not exceed $20,000, exclusive of interest, and
   - c. Is free of any indication of fraud or misrepresentation and does not arise from an exception made by the General Accounting Office,

   THEN

   the Agency head or his representative may
   - a. Compromise the claim, or
   - b. Suspend or terminate collection action in light of
     - i. The expense of collection,
     - ii. The probability of obtaining a favorable judgement, and
     - iii. The probability of collecting on such a judgement.

Any such compromise, suspension, or termination of collection activities, must be in accordance with standards established jointly by the Attorney General and the Comptroller General (4 C.F.R. Parts 101-105). Federal Claims Collection Act of 1966, Public Law 89-508, 80 Stat. §308 (19 July 1966); 31 U.S.C. §§951-953 (1970).

Flow Down

Not required

Special Notes

1. The FPR does not specify the procedures for determining and demanding amounts due to the Government. Nor does it state the conditions for the Contractor's postponing payment. Because the

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D-10 LIMITATION OF COST (1966 OCT)

(a) It is estimated that the total cost to the Government for the performance of this contract, exclusive of any fee, will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use his best efforts to perform the work specified in the Schedule and all obligations under this contract within such estimated cost. If, at any time, the Contractor has reason to believe that the cost which he expects to incur in the performance of this contract in the next succeeding sixty (60) days, when added to all costs previously incurred, will exceed seventy-five percent (75%) of the estimated cost set forth in the Schedule, or if, at any time, the Contractor has reason to believe that the total cost to the Government for the performance of this contract, exclusive of any fee, will be greater or substantially less than the then estimated cost hereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving the revised estimate of such total cost for the performance of this contract.

(b) Except as required by other provisions of this contract specifically citing and stated to be, an exception from this clause, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue performance under the contract (including actions under the Termination clause) or otherwise to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. No notice, communication or representation in any other form or from any person other than the Contracting Officer shall affect the estimated cost of this contract. In the absence of the specified notice, the Government shall not be obligated to reimburse the Contractor for any costs in excess of the estimated cost set forth in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the Contractor in excess of the estimated cost prior to such increase shall be allowable to the same extent as if such costs had been incurred after the increase; **unless** the Contracting Officer issues a termination or other notice and directs that the increase is solely for the purpose of covering termination or other specified expenses.

(c) Change orders issued pursuant to the Changes clause of this contract shall not be considered an authorization to the Contractor to exceed the estimated cost set forth in the Schedule in the absence of a statement in the change order, or other contract modification, increasing the estimated cost.

ASPR procedures highlight these major concerns, they have been used here to put the ''Interest'' clause into perspective. Similar procedures under the FPR may vary from Agency to Agency. D-9

LIMITATION OF COST D-10

References
ASRP 7-402.2(a) (1966 OCT)
FPR §1-7.202.3
HEW-315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To aid the Government in controlling the amount it will ultimately have to pay under cost-reimbursement programs by requiring the Contractor to discover any potential cost overruns or shortages and notify the Government before their occurrence.

Comment

The Contractor does not guarantee to perform the contract at his estimated total cost: He agrees only to use his best efforts to keep costs down.

Total payments to the Contractor may not exceed total estimated costs — but total estimated cost may be revised.

1. The Contractor must
   a. Keep a record of his costs
   b. Notify the Government **in writing** when he thinks total costs will be
      i. greater than estimated cost
      ii. substantially less than estimated
   c. Notify the Government when, within the next 60 days, total costs will exceed 75% of total estimated costs
   d. **Specify** a revised total estimated cost when it becomes clear that it will be greater or substantially less than prior estimated total cost.
2. The Contractor is **not** required to continue working once his actual costs equal his total estimated cost.
3. **Only** the Contracting Officer may revise the estimated total cost. In order to do so, he must
   a. Specify the revised estimated total cost
   b. Give written notice to the Contractor of the revision.

Flow Down

Not required.

Special Notes

1. If the Contracting Officer orders a change in part of the contract, such change will **not automatically** increase the total estimated cost. Only a specific written increase can increase total estimated cost.
2. In case the contract is terminated, or fails to get its total estimated cost revised, the Government and the Contractor will divide all the property involved according to their respective shares of incurred costs.
3. Under ASPR a substantially similar clause is used for cost-reimbursement contracts involving cost sharing: Limitation of Cost (Cost Sharing) (1973 May) ASPR 7-402.2(b).

D-11 LIMITATION ON WITHHOLDING OF PAYMENTS (1959 FEB)

If more than one clause or Schedule provision of this contract authorized the temporary withholding of amounts otherwise payable to the Contractor for work performed under this contract, the total of the amounts so withheld at any one time shall not exceed the greatest amount which may be withheld under any one such clause or Schedule provision at that time; **provided** that this limitation shall not apply to:

(i) withholdings pursuant to any clause relating to wages or hours of employees;
(ii) withholding not specifically provided for by this contract; and
(iii) the recovery of overpayments.

D-12 LITIGATION AND CLAIMS

The Contractor shall give the Contracting Officer immediate notice in writing of (a) any action, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract, including, but not limited to the performance of any Subcontractor hereunder; and (b) any claim against the Contractor the cost and expense of which is allowable under the clause entitled ''Allowable Cost.'' Except as otherwise directed by the Contracting Officer, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action or claim. To the extent not in conflict with any applicable policy or insurance, the Contractor may, with the Contracting Officer's approval, settle any such action or claim. if required by the Contracting Officer, the Contractor shall (a) effect an assignment and subrogation in favor of the Government of all the Contractor's rights and claims (except those against the Government) arising out of any such action or claim against the Contractor; and (b) authorize representatives of the Government to settle or defend any such action or claim and to represent the Contractor in, or to take charge of, any action. If the settlement or defense of

LIMITATION ON WITHHOLDING OF PAYMENTS

D-11

Reference

ASPR 7-403.12 (1959 FEB)

Source of Clause

Regulation

Purpose of Clause

To prevent undue hardship to the Contractor by imposing a limit on the amount of payments which the Government may withhold.

Comment

1. **The Limitation**

   IF

   two or more clauses or provisions in the contract provide for the withholding of payments due (e.g., ''Allowable Cost and Payment'' and ''Patent Rights'')

   THEN

   the total amount withheld at any one time **may not be greater than** the maximum amount authorized to be withheld under any **one** clause or provision.

2. **Inapplicability of the Limitation**

   The Government is **not** generally prevented from withholding payments to the Contractor.

   a. Policy Exception to the Clause

      The Contracting Officer or procuring activity will not insert this clause when it is determined that the limitation is incompatible with the purposes of the withholding provisions affected.

   b. General exceptions to the Clause

      The withholding limitation does not apply to:

      i. withholding pursuant to any clause relating to wages or hours of employees (e.g., the clause ''Contract Work Hours and Safety Standards Act-Overtime Compensation'').

      ii. withholdings not specifically provided for by the contract.

      iii. recovery of overpayments.

Flow Down

Not required.

Special Notes

1. This clause will not be inserted in the contract if it is redundant or would have no effect because of the wording of the particular withholding clauses as they relate to each other.
2. Contracts with educational institutions **may entirely omit** most of the provisions relating to withholding of payments, thus making this clause unnecessary.

LITIGATION AND CLAIMS

D-12

Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

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an action or claim is undertaken by the Government, the Contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Contractor is not covered by a policy of insurance, the Contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith. The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof, to the extent that the Contractor would have been compensated by insurance which was required by law or regulation or by written direction of the Contracting Officer, but which the Contractor failed to secure through its own fault or negligence.

In any event, unless otherwise expressly provided in this contract, the Contractor shall not be reimbursed or indemnified by the Government for any liability loss, cost or expense, which the Contractor may incur or be subject to by reason of any loss, injury, or damage, to the person or to real or personal property of any third parties as may accrue during, or arise from, the performance of this contract.

To require immediate notification of the Contracting Officer by the Contractor of any claim or action, brought either in a court of law or before an administrative agency, arising out of work under the contract.

Comment

1. Notice Requirements

   IF

   a. Any court action or administrative proceeding arising from work under the prime contract or, subcontract is filed against the Contractor

   b. Any claim, the payment of which is an allowable cost under the ''Allowable Cost'' clause, is raised against the Contractor

   THEN

   The Contractor must give the Contracting Officer

   a. **Immediate written** notice

   b. **Copies** of all pertinent papers he receives (unless the Contracting Officer directs otherwise).

2. The Contracting Officer may require the Contractor to

   a. Assign and subrogate to the Government all rights and claims (except those against the Government) arising from the action or claim.

   b. Authorize the Government to settle, defend, or represent it in any action or claim against it or on its behalf.

   The Contractor must furnish all reasonable assistance in such settlements or defenses.

3. Process of the claim

   a. The Contractor may **settle** any such action or claim **IF**
      i. the applicable insurance policy allows him to **AND**
      ii. the Contracting Officer approves.

   b. The Contractor **must** defend an action against it **IF**
      i. the action is not covered by insurance **AND**
      ii. the Contracting Officer approves.

4. Contractor Liability

   a. **Costs of Defense**
      i. The Government is **not liable** for defense costs, to the extent that the Contractor would have been compensated by insurance **required**
         a. by law or regulation
         b. by **written** direction of the Contracting Officer if the Contractor negligently failed to get it.
      ii. By **implication,** the **Government is liable for**
         a. Defense costs exceeding any insurance-required amounts
         b. All defense costs, if the Contractor's failure to have the required insurance is **not** due to his fault or negligence
         c. The Contractor should confirm this — in writing — with the Contracting Officer.

   b. **Liability for loss, injury or damage**
      1. The Contractor is liable for any loss, injury or damage
         a. to the person
         b. to the real or personal property of any third parties arising from the performance of the contract
      2. The Contractor may not be reimbursed or indemnified by the Government for any liability loss, cost, or expense **unless** it is **expressly** provided otherwise in this contract

Flow Down

Not Required

Special Notes

The directions and approvals to be given by the Contracting Officer **do not have to be in writing.** However, the Contractor is advised to get such directions and agreements in writing, if possible.

D-13 NEGOTIATED OVERHEAD RATES — (PREDETERMINED) (1970 SEP)

(a) Notwithstanding the provisions of the clause of this contract entitled ''Allowable Cost and Payment'', the allowable indirect costs under this contract shall be obtained by applying predetermined overhead rates to bases agreed upon by the parties, as specified below.

(b) The Contractor as soon as possible but not later than three (3) months after the expiration of his fiscal year shall submit to the Contracting Officer with a copy to the cognizant audit activity, a proposed predetermined overhead rate or rates based on the Contractor's actual cost experience during that fiscal year, together with supporting cost data. Negotiation of predetermined overhead rates by the Contractor and the Contracting Officer shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with the Armed Services Procurement Regulation, Section XV, Part 3, as in effect on the date of this contract.

(d) Predetermined rate agreements in effect on the effective date of this contract shall be incorporated into the contract schedule. Rates for subsequent periods shall be negotiated and the results set forth in a written overhead rate agreement executed by both parties. Such agreement shall be automatically incorporated into this contract upon execution and shall specify (i) the agreed predetermined overhead rates, (ii) the bases to which the rates apply, (iii) the fiscal year unless the parties agree to a different period for which the rates apply, and (iv) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs. The overhead rate agreement shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract.

(e) Pending establishment of predetermined overhead rates for any fiscal year or different period agreed to by the parties, the Contractor shall be reimbursed either at the rates fixed for the previous fiscal year or other period or at billing rates acceptable to the Contracting Officer subject to appropriate adjustment when the final rates for that fiscal year or other period are established.

(f) Any failure by the parties to agree on any predetermined overhead rate or rates under this clause shall not be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the ''Disputes'' clause of this contract. If for any fiscal year or other period specified in the Schedule of this contract the parties fail to agree to a predetermined overhead rate or rates it is agreed that the allowable indirect costs under the contract shall be obtained by applying negotiated final overhead rates in accordance with the terms of the ''Negotiated Overhead Rates — Postdetermined'' clause set forth in 3-704.2 of the Armed Services Procurement Regulation as in effect on the date of this contract.

(g) Allowable indirect costs for the period until the end of the Contractor's fiscal year during which performance begins shall be obtained by applying the predetermined overhead rate set forth in the Schedule to the bases set forth therein.

NEGOTIATED OVERHEAD RATES (POSTDETERMINED) (1970 SEP)

(a) Notwithstanding the provisions of the clause of this contract entitled ''Allowable Cost and Payment'', the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties as specified below.

(b) The Contractor, as soon as possible but not later than six (6) months after the expiration of each period specified in the Schedule shall submit to the Contracting Officer with a copy to the cognizant audit activity, a proposed final overhead rate or rates for that period based on the Contractor's actual cost experience during that period, together with supporting data. Negotiation of final overhead rates by the Contractor and the Contracting Officer shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with the Armed Services Procurement Regulation, Section XV, Part 3, as in effect on the date of this contract.

(d) The results of each negotiation shall be set forth in a written overhead rate agreement, executed by both parties. Such agreement is automatically incorporated in this contract upon execution and shall specify (i) the agreed final rates, (ii) the bases to which the rates apply, (iii) the periods for which the rates apply, and (iv) the items treated as direct costs. The overhead rate agreement shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract.

(e) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated billing rates as provided in the Schedule or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when final rates for that period are established. To prevent substantial over or under payment, billing rates may, at the request of either party, be revised by mutual agreement, either retroactively or prospectively. Any such revision of the negotiated billing rates provided in the Schedule shall be set forth in a modification to this contract.

(f) Any failure by the parties to agree on any final rate or rates under this clause shall be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the ''Disputes'' clause of this contract.

NEGOTIATED OVERHEAD RATES

References

Predetermined

ASPR 7-403.9 (1970 SEP) in accordance with 3-704.2 (b)
FPR 1-7.203-9 incorporates 1-3.704-2 (b)
HEW-315 (Rev. 12/72)Clause #5 (ii)

Fixed Rate with Carryforward Adjustment

HEW-315 (Rev. 12/72) Clause #5(iii)

Post Determined

ASPR 7-403.9 incorporates 7-204.16 (b) (1970 SEP), in accordance with §3-704.2 (a)
FPR 1-7.203-9 incorporates 1-3.704-2 (a)
HEW-315 (Rev. 12/72) Clause #5(i)

Source of Clauses

Regulation, authorized in part by 41 U.S.C. §254 (a) (1970); 76 Stat. §437

Purpose of Clauses

To provide alternative means of determining allowable indirect costs in contracts with the Government

Comment

1. **Overhead Rates**
   a. A **negotiated overhead rate** is an agreed-upon percentage which, when **applied against a base of direct costs** (usually measured by the Contractor's direct salaries and wages), **results in the allowable indirect costs** of the contract which may be subject to adjustment depending on the type of rate used.
   b. A **predetermined overhead rate** is determined by using a Contractor's cost experience from the previous fiscal year (or any other period specified in the contract) — hereafter ''period'' — to estimate the contract's allowable indirect-to-direct cost percentage for the following period.
   c. A **fixed overhead rate subject to carryforward adjustment** for a particular period is determined by using a Contractor's cost experience from the previous period to estimate the contract's allowable indirect-to-direct cost percentage for the particular period, to be adjusted in the subsequent period's rate for any difference between the particular period's estimated and actual indirect costs.

   As a result, any subsequent period's fixed overhead rate will be based on
      1. The Contractor's actual cost experience during the prior period and an adjustment to the projected indirect costs — adding or subtracting
      2. The carryforward adjustment, which is the **difference between**
         a. The **allowed indirect costs** determined by applying the negotiated fixed overhead rate for the prior period to the actually experienced direct cost base of that period and
         b. The **actual indirect costs** experienced in the prior period.

   d. A **postdetermined overhead rate** is determined at the end of a period under the contract and is based upon the Contractor's actual cost experience during that period
   e. **"Allowable costs" and overhead rates**

      Even though the contract contains the ''Allowable Cost'' or ''Allowable Cost and Payment'' clause, the allowable costs of the contract must be obtained by applying negotiated overhead rates to the cost bases agreed upon by the parties.
2. **Negotiating the Overhead Rate**
   a. **The Contractor's Proposal**
      1. **For a predetermined rate**

         Within **3 months** after the close of its fiscal year (or other specified period), the **Contractor must submit** to the **Contracting Officer** (with a copy to the Audit Activity)

         a. A proposed predetermined overhead rate based on the prior period's actual costs, and

D-13 NEGOTIATED OVERHEAD RATES HEW-315 (REV. 12/17) CLAUSE 5 (iii)

(a) Notwithstanding the provisions of the clause of this contract entitled, ''Allowable Cost,'' the allowable indirect costs under this contract shall be obtained by applying negotiated fixed overhead rates for the applicable period(s) to bases agreed upon by the parties, as specified below. A negotiated fixed rate(s) is based on an estimate of the costs which will be incurred during the period for which the rate(s) applies. When the application of the negotiated fixed rates against the actual base(s) during a given fiscal period produces an amount greater or less than the indirect costs determined for such period, such greater or lesser amount(s) will be carried forward to a subsequent period.

(b) The Contractor, as soon as possible but no later than six (6) months after the close of his fiscal year, or such other period as may be specified in the contract, shall submit to the Secretary, or his duly authorized representatives, with a copy to the cognizant audit activity, a proposed fixed overhead rate or rates based on the Contractor's actual cost experience during the fiscal year, including adjustment, if any, for amounts carried forward, together with supporting cost data. When the application of the negotiated fixed rate(s) against the actual base(s) for a given fiscal period produces an amount greater or less than the actual indirect costs determined for that period, such greater or lesser amount(s) will be carried forward and reflected in the negotiated fixed rate(s) of a subsequent period.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with Subpart 1-15.3 of the Federal Procurement Regulations (41 CFR 1-15.3), as in effect on the date of this contract.

(d) The results of each negotiation shall be set forth in an amendment to this contract, which shall specify (1) the agreed fixed overhead rates, (2) the bases to which the rates apply, (3) the fiscal year, unless the parties agreed to a different period, for which the rates apply, and (4) the specified items treated as direct costs or any changes in the items previously agreed to be direct costs.

(e) Pending establishment of fixed overhead rates for any fiscal year or different period agreed to by the parties, the Contractor shall be reimbursed either at the rates fixed for the previous fiscal year or other period or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that fiscal year or other period are established.

(f) Any failure of the parties to agree on any fixed overhead rate or rates or to the amount of any carryforward adjustment under this clause shall not be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the ''Disputes'' clause of this contract. If for any fiscal year or other period specified in the contract, the parties fail to agree to a fixed overhead rate or rates, it is agreed that the allowable indirect costs under this contract shall be obtained by applying negotiated final overhead rates in accordance with the terms of the ''Negotiated Overhead Rates-Postdetermined'' clause set forth in Section 1-3.704-2(a) of the Federal Procurement Regulations, as in effect on the date of this contract.

(g) Submission of proposed fixed, provisional, and/or final overhead rates, together with appropriate data in support thereof, to the Secretary or his duly authorized representative and agreements on fixed, provisional, and/or final overhead rates entered into between the Contractor and the Secretary or his duly authorized representative, as evidenced by Negotiated Overhead Rate Agreements signed by both parties shall be deemed to satisfy the requirements of (b), (d), and (e), above.

b. Supporting cost data.

2. **For a fixed overhead rate subject to carryforward adjustment (allowed only under HEW)**

Within **6 months** after the close of its fiscal year (or other specified period) the Contractor **must submit to** the **Secretary of HEW** or his duly authorized representative (with a copy to the audit activity)

a. A proposed fixed overhead rate based on

1. The Contractor's actual cost experience of the prior period and
2. Any adjustment to be carried forward from that prior period for under or over payment of direct costs **AND**

b. Supporting Cost Data.

3. **For a postdetermined overhead rate**

Within **6 months** after the close of its fiscal year (or other specified period), the Contractor **must submit** to the **Contracting Officer** (with a copy to the Audit Agency)

a. A proposed final overhead rate based on the Contractor's actual cost experience for that period and

b. Supporting Cost data

b. Actual negotiations between the Contractor and the Contracting Officer (or Secretary of HEW when required) will begin as soon as practicable after the Contracting Officer or Secretary receives the proposed rates.

c. To be allowed in the determination of the overhead rate, all costs and cost allocation methods must be in accordance with the cost principles set out in 1-15.3 of the FPR and 15.3 of the ASPR (FMC 73-8).

3. **Interim Overhead Rates**

a. **While negotiating a predetermined** overhead rate or a **fixed rate subject to carryforward adjustment**

1. Basic interim rate — the Contractor shall be paid at

a. The previous period's rate, **OR**

b. A tentative billing rate acceptable to the Contracting Officer.

2. Modifications — both of these rates are subject to modification when the final rate for the period is established.

b. Until the **postdetermined** overhead rate is established

1. Basic Interim Rate — The Contractor shall be paid at

a. A negotiated provisional indirect cost rate, as provided in the contract, **OR**

b. A billing rate acceptable to the Contracting Officer.

2. Modifications — both of these rates are subject to modifications when the final rate for the period or prospective — may be made in

a. The negotiated provisional rate, when agreed to by both parties.

This agreement must be set forth as a specific revision of the contract.

b. The billing rate, whenever the Contracting Officer desires.

c. Either rate when the final rate is established.

4. **Failure to Agree**

a. On a **predetermined overhead rate,** a **fixed overhead rate,** or the amount of any **carryforward adjustment**

1. **Is not a dispute** concerning a question of fact under the ''Disputes'' clause
2. Automatically causes the contract's allowable indirect costs to be determined using an overhead rate negotiated **at the end** of the year or period of performance in accord with the postdetermined overhead rate clause.

b. On a postdetermined overhead rate is a dispute concerning a question of fact for decision by the Contracting Officer under the ''Disputes'' clause.

5. **The Negotiated Agreement**

a. The negotiated agreement on a **predetermined overhead rate or** on a **fixed overhead rate** subject to a carryforward adjustment must be set forth in a modification or amendment (such is done automatically under the ASPR) to the contract specifying the

1. Agreed overhead rates

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D-14 OVERTIME

Except as authorized by Section 1-12.102-5 of the Federal Procurement Regulations as in effect on the effective date of this contract or otherwise provided in this contract, the Contractor shall not perform overtime work under or in connection with this contract for which premium compensation is required to be paid, without specific written approval from the Contracting Officer.

2. Bases to which the rates apply
3. Fiscal year, or other agreed period, for which the rates apply, and
4. Specific items to be treated as direct costs (or any changes in items previously agreed to be direct costs).

b. The negotiated agreement on a **postdetermined overhead rate** must be set forth in a modification (such is done automatically under the ASPR) to the contract specifying the

1. Agreed final rates
2. Bases to which the rates apply
3. Fiscal year, or other agreed period, for which the rates apply
4. Items to be treated as direct costs (required only under the ASPR).

Flow Down

Not required. If the Subcontractor has a current negotiated overhead rate with the Government, then that rate should be acceptable in a subcontract. Explicit approval of the rate as a determination of the allowability of indirect costs may be sought from the Contracting Officer when the subcontract is submitted for approval. See analysis of ''Subcontracts'' clause, p. 209.

Special Notes

1. The overhead rate agreement does **not** change any monetary ceiling, contract obligation, specific cost allowance or disallowance set forth in the contract (i.e. It will not increase the contract's total estimated cost; see the ''Limitation of Cost'' clause).

2. Under the various HEW overhead rate clauses, the Contractor is authorized to submit its proposed overhead rates to and make a negotiated overhead rate agreement with the Secretary of HEW, or his authorized representative, rather than the Contracting Officer.

3. When an Educational Institution is involved in research funded by more than one agency, the **agency most involved with the Institution** will be responsible for negotiating the contracting institution's overhead rate and coordinating the negotiation and its outcome with the other interested agencies. (FMC 73-6). The goal is to have one overhead rate apply to **all** of the institution's Government work.

4. Even though predetermined overhead rates may generally be used **only** by institutions which use the **same rate basis** for all its Government contracts (FPR 1-3.704-2 (b); ASPR 3-704.2 (b)), in some instances, different rates may be more appropriate. (FPR 1-15.307.1 (a); ASPR 15-307.1 (b)).

5. When a Contractor proposes his first predetermined overhead rate, he must
   a. Give the rates to apply for the rest of the fiscal year.
   b. Show, if possible, cost experiences on similar contracts.
   c. Use the Contracting Officer's temporary billing rate until it is approved.

OVERTIME

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Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To keep costs down by preventing unwarranted use of overtime.

Comment

1. **Overtime** is the time worked by an employee of the Contractor in excess of
   a. a normal workweek of 40 hours, or
   b. a normal workday of 8 hours.

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D-15 PAYMENT

(a) **Payment on account of allowable costs.** Once each month (or at more frequent intervals if approved by the Contracting Officer) the Contractor may submit to the Contracting Officer, in such form and reasonable detail as may be required, an invoice or voucher supported by a statement of costs incurred by the Contractor in the performance of this contract and claimed to constitute allowable costs. Promptly after receipt of each invoice or voucher the Government shall, subject to the provisions of (b) below, make payment thereon as approved by the Contracting Officer.

(b) **Audit adjustments.** At any time or times prior to settlement under this contract the Contracting Officer may have invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by the Contracting Officer, on the basis of such audit, not to constitute allowable cost. Any payment may be reduced for overpayment, or increased for underpayments, on preceding invoices or vouchers.

(c) **Completion voucher.** On receipt and approval of the invoice or voucher designated by the Contractor as the ''completion invoice'' or ''completion voucher'' and upon compliance by the Contractor with all the provisions of this contract (including without limitation, the provisions relating to patents and provisions of (d) below) the Government shall promptly pay to the Contractor any balance of allowable cost. The completion invoice or voucher shall be submitted by the Contractor promptly following completion of the work under this contract but in no event later than 6 months (or such longer period as the Contracting Officer may in his discretion approve in writing, from the date of such completion.

(d) **Applicable credits.** The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the Contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the Contracting Officer.

(e) **Financial settlement.** Prior to final payment under this contract, the Contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(1) An assignment to the Government in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including any interest thereon) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(2) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(i) Specified claims in stated amounts or in estimated amounts where the amounts are susceptible to exact statement by the Contractor;

(ii) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract: **Provided,** That such claims are not known to the

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2. Work that results in the payment of an overtime premium cannot normally be performed without the **specific written approval** of the Contracting Officer.
   a. However, overtime may be performed
      i. to cope with emergencies,
      ii. if done by indirect labor employees,
      iii. in operations continuous in nature, which cannot reasonably be interrupted, or otherwise completed, or
      iv. when lower overall cost to the Government will result.
   b. The amount of overtime worked under the above exceptions must be, however, **reasonable** and **properly allocable** to the contract.

   This clause does not prohibit the payment of premiums to employees who work on an extra-pay shift.

Flow Down

Not Required.

Special Notes

1. Overtime may be defined differently for areas outside the United States, its possessions, and Puerto Rico, if the local norm is greater than 40 hours a week or 8 hours a day.
2. In order to determine when overtime compensation is required, refer to the Contract Work Hours Standards Act of 1962, 40 U.S.C. §§327-330 (1970) and the regulations promulgated thereunder by the Secretary of Labor, Title 29, Part 5 of the Code of Federal Regulations (C.F.R.)

PAYMENT

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Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To establish procedures for payment, auditing of expenses, recovery of rebates, and recording of claims against the Government.

Comment

1. **For Periodic Payment** — the Contractor submits
   a. A reasonably detailed voucher.
   b. A statement of costs in support **thereof**
2. When the voucher is approved by the Contracting Officer, payment is made promptly.
3. A voucher may be audited at any time prior to final payment. A periodic payment may be
   a. Reduced for a prior overpayment,
   b. Increased for a prior underpayment.
4. **To get Final Payment,** the Contractor must
   a. Submit a Completion Invoice to the Contracting Officer within 6 months of completion,
   b. Release, with exceptions indicated in the Special Note, any of his claims against the Government arising under the particular contract,
   c. Assign any credits (such as discounts, rebates, etc.) arising from expenditures under the contract to the Government.

Flow Down

Not required.

D-15 Contractor on the date of the execution of the release: **And provided further,** That the Contractor gives notice of such claims in writing to the Contracting Officer not more than 6 years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier; and

(iii) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents.

D-16 PAYMENT FOR OVERTIME PREMIUMS (1967 JUN)

(a) Allowable cost shall not include any amount on account of overtime premiums except when (i) specified in (d) below or (ii) paid for work —

- (A) necessary to cope with emergencies such as those resulting from accidents, natural disasters, breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature;
- (B) by indirect labor employees such as those performing duties in connection with administration, protection, transportation, maintenance, standby plant protection, operation of utilities, or accounting;
- (C) in the performance of tests, industrial processes, laboratory procedures, loading or unloading of transportation media, and operations in flight or afloat, which are continuous in nature and cannot reasonably be interrupted or otherwise completed; or
- (D) which will result in lower overall cost to the Government.

(b) The cost of overtime premuims otherwise allowable under (a) above shall be allowed only to the extent the amount thereof is reasonable and properly allocable to the work under this contract.

(c) Any request for overtime, in addition to any amount specified in (d) below, will be for all overtime which can be estimated with reasonable certainty shall be used for the remainder of the contract, and shall contain the following:

- (i) identification of the work unit, such as the department or section in which the requested overtime will be used, together with present workload, manning and other data of the affected unit, sufficient to permit an evaluation by the Contracting Officer of the necessity for the overtime;
- (ii) the effect that denial of the request will have on the delivery or performance schedule of the contract;
- (iii) reasons why the required work cannot be performed on the basis of utilizing multi-shift operations or by the employment of additional personnel; and
- (iv) the extent to which approval of overtime would affect the performance or payments in connection with any other Government contracts, together with any identification of such affected contracts.

(d) The Contractor is authorized to perform overtime, in addition to that performed under (a)(ii), to the extent that the overtime premium does not exceed *________

*Insert the amount, in dollars, agreed to during negotiations as representing the overtime premiums applicable to overtime not reimbursable under the exceptions contained in (a) (ii) of the clause. If it was agreed that the contract could be performed without the use of additional overtime, insert ''Zero.''

Special Notes D-15

The Contractor does **not** have to release all of his contract-related claims against the Government in order to receive final payment.

The Contractor may,

a. Continue any specified claims for actual or estimated amounts,
b. Within 6 years raise Contractor-liability-to-third-party claims arising from contract performance but not known at the time of the release,
c. Continue or raise claims for reimbursement for costs incurred due to the patent provisions if any, of the contract.

PAYMENT OF OVERTIME PREMIUMS

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References

ASPR 7-402.28 incorporates 7-203.27 (1967 JUN)
FPR 1-7.202-29

Source of Clause

Regulation

Purpose of Clause

To keep Government costs down by preventing unwarranted use of overtime in contract performance.

Comment

1. The clause is required in all cost-reimbursement type contracts in excess of $100,000
2. Overtime is the time worked by an employee of the Contractor in excess of:
   a. the normal workday of eight (8) hours; or
   b. the normal workweek of forty (40) hours.
3. Overtime premiums are allowable cost to the extent that they are reasonable and properly allocable to work under the contract **AND**
   a. Paid for work,
      (i) to cope with emergencies,
      (ii) by indirect labor employees,
      (iii) in operations in nature which cannot be reasonably interrupted or otherwise completed, or
      (iv) results in lower overall cost to the Government.

   OR

   b. Approved by the approving officer (who is not necessarily the Contracting Officer) and incorporated into the contract either
      (i) at the beginning, or
      (ii) during performance.
4. The Contractor may request overtime in addition to that specified in this clause (paragraph ''d'') if such request contains:
   a. a reasonably certain estimate of the amount of overtime premiums required to contract completion;
   b. an identification of the department where the overtime will be used, together with information sufficient to permit an evaluation by the Contracting Officer of the necessity for the overtime;
   c. a statement of the effect of denial of the request on delivery or performance schedule of the contract;
   d. a statement of why alternatives (such as multishift operations or additional employees) cannot be used; and
   e. a statement of how the approval of overtime will affect other Government contracts with the Contractor.
5. To approve the request for additional overtime, the approving officer must determine in writing that the overtime is necessary:

PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (1970 JAN)

If any price, including profit or fee, negotiated in connection with this contract or any cost reimbursable under this contract was increased by any significant sums because:

(i) the Contractor furnished cost or pricing data which was not complete, accurate and current as certified in the Contractor's Certificate of Current Cost or Pricing Data;

(ii) a Subcontractor, pursuant to the clause of this contract entitled ''Subcontractor Cost or Pricing Data'' or ''Subcontractor Cost or Pricing Data — Price Adjustments'' or any subcontract clause therein required, furnished cost or pricing data which was not complete, accurate and current as certified in the Subcontractor's Certificate of Current Cost or Pricing Data;

(iii) a Subcontractor or prospective Subcontractor furnished cost or pricing data which was required to be complete, accurate and current and to be submitted to support a subcontract cost estimate furnished by the Contractor but which was not complete, accurate and current as of the date certified in the Contractor's Certificate of Current Cost or Pricing Data; or

(iv) the Contractor or a Subcontractor or prospective Subcontractor furnished any data, not within (i), (ii) or (iii) above, which was not accurate as submitted;

the price or cost shall be reduced accordingly and the contract shall be modified in writing as may be necessary to reflect such reduction. However, any reduction in the contract price due to defective subcontract data of a prospective Subcontractor when the subcontract was not subsequently awarded to such Subcontractor, will be limited to the amount (plus applicable overhead and profit markup) by which the actual subcontract, or actual cost to the Contractor if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor, **provided** the actual subcontract price was not affected by defective cost or pricing data.

Note: Since the contract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, it is expected that the Contractor may wish to include a clause in each such subcontract requiring the Subcontractor to appropriately indemnify the Contractor. However, the inclusion of such a clause and the terms thereof are matters for negotiation and agreement between the Contractor and the Subcontractor, **provided** that they are consistent with ASPR 23-203 relating to Disputes provisions in subcontracts. It is also expected that any Subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower tier Subcontractors.

  - a. to meet important delivery or performance schedules;
  - b. to make up for excusable delays; or
  - c. as the only way to eliminate foreseeable bottlenecks.

6. The authorization to perform overtime is in terms of an allowable dollar amount of overtime premiums, not in terms of hours.

Flow Down

Not required.

Special Notes

None.

PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

References

ASPR 7-402.31 incorporates 7-104.29(a) (1970 JAN) in accordance with 3-807.3 through 3-807.5
FPR 1-7.202-31 incorporates 1-3.814-1(a)

Source of Clause

Regulation, and for ASPR; 10 U.S.C. §2306(f)(1)(2) (1970); **Truth in Negotiation Act** 76 Stat. §528 (1962).

Purpose of Clause

To protect the Government from being overcharged by Contractors who base their costs on defective cost or pricing data.

Comment

1. **Applicability**

   This clause is required in all negotiated contracts

   - a. for over $100,000, **OR**
   - b. for which a **certificate** of current cost or pricing data has been submitted,
   - c. for which partial cost or pricing data has been submitted, as required by the Contracting Officer.

2. **Cost or Pricing Data** consists of **all facts** about price existing up to the time of the contract agreement which prudent buyers and sellers would reasonably expect to have a significant effect on the price negotiations. Such include

   - a. historical accounting data
   - b. nonrecurring costs
   - c. seller's quotations
   - d. changes in productive mothod or volume
   - e. unit cost trends **AND**
   - f. **any** other factor having an influence on cost.

(The primary standard for judging a Contractor's cost data are found in part 3 of section 15 of both the ASPR and the FPR ''Contract Cost Principles'')

3. **Submission and Certification of Cost or Pricing Data**

   Under the law, the Contractor must

   - a. **Submit** cost or pricing data **prior to**
     - i. **the award** of any negotiated prime contract exceeding $100,000 or
     - ii. **any contract change or modification** causing an aggregate price adjustment expected to exceed
       - a. $100,000, or
       - b. a lesser amount prescribed by the head of the agency involved.
   - b. **Certify that, as of the date** when the price negotiations were concluded and the **contract price agreed**

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D-18 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA — PRICE ADJUSTMENTS (1970 JAN)

(a) *This clause shall become operative only with respect to any modification of this contract which involves aggregate increases and/or decreases in costs plus applicable profits in excess of $100,000 unless the modification is priced on the basis of adequate competition, established catalog or market prices of commercial items sold in

to, the cost or pricing data was

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  i. accurate
  ii. complete
  iii. current

(Such certification must be made on a **form prescribed** by the ASPR and FPR)

4. **Reduction and Modification for Defective Cost or Pricing Data**

IF

any negotiated price or **any** reimbursable cost is **significantly increased** because the Contractor, a Subcontractor or a prospective Subcontractor furnished data

a. that was not accurate, or
b. that was not **accurate, complete,** and **current as certified,**

THEN

a. the **price or cost** must be **reduced** accordingly **AND**
b. the **contract** must be **modified in writing** as may be necessary to reflect such a reduction.

Flow Down

Not required, **but** the ASPR and FPR suggest that the Contractor and higher-tier Subcontractors should insert indemnification clauses to protect themselves against price reductions caused by defective data submitted by their Subcontractors.

Special Notes

1. This clause does **not have to be** used in contracts
   a. **with foreign governments** or their agencies, **if** the requirement is waived by the head of the procuring activity or agency (who must state his reasons in writing)
   b. **where the price is based on**
      i. adequate market competition
      ii. established catalogue or market prices of commercial items, **OR**
      iii. prices set by law or regulation.
2. **IF**

   the defective data were furnished by a **prospective** Subcontractor who **did not** receive the subcontract,

   THEN

   the price reduction is limited to the amount (including overhead and profit mark up) by which the prospective subcontract cost estimate exceeded

   a. the actual subcontract, (provided that it was not affected by the defective data) or
   b. the actual cost to the Contractor, if there were no subcontract
3. There is no specific standard for determining what is a **significant increase** in the contract price or cost. Any such determination will depend upon the facts and circumstances of such individual case.
4. The amount of the price reduction is a question of fact and any failures to agree on such an amount will be resolved under the ''Disputes'' clause (see its discussion). A Contractor under the ASPR must remember that the Contracting Officer is **not permitted** to consent to any Contractor's attempt to give its Subcontractor the right of **direct** appeal to the Armed Services Board of Contract Appeals.
5. The words of this clause **do not** expressly cover contract price adjustments. (See the ''Price Reduction for Defective Cost or Pricing Data — Price Adjustments'' clause). However, the Contractor, generally is **legally bound by the substance** of that clause, so even if it is not in the contract, the Contractor should obey it thoroughly.
6. The Contractor should keep copies of its cost or pricing data, for the Government has the right to review its records until three years after **final** payment on the contract.

PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA—

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PRICE ADJUSTMENTS

substantial quantities to the general public, or prices set by law or regulation. The right to price reduction under this clause is limited to defects in data relating to such modifications.

(b) If any price, including profit, or fee, negotiated in connection with any price adjustment under this contract was increased by any significant sums because:

- (i) the Contractor furnished cost or pricing data which was not complete, accurate and current as certified in the Contractor's Certificate of Current Cost or Pricing Data;
- (ii) a Subcontractor, pursuant to the clause of this contract entitled ''Subcontractor Cost or Pricing Data'' or ''Subcontractor Cost or Pricing Data—Price Adjustments'' or any subcontract clause therein required, furnished cost or pricing data which was not complete, accurate and current as certified in the subcontractor's Certificate of Current Cost or Pricing Data;
- (iii) a Subcontractor or prospective Subcontractor furnished cost or pricing data which was required to be complete, accurate and current and to be submitted to support a Subcontractor cost estimate furnished by the Contractor but which was not complete, accurate and current as of the date certified in the Contractor's Certificate of Current Cost or Pricing Data; or
- (iv) the Contractor or a Subcontractor or prospective Subcontractor furnished any data, not within (i), (ii) or (iii) above, which was not accurate, as submitted;

the price shall be reduced accordingly and the contract shall be modified in writing as may be necessary to reflect such reduction. However, any reduction in the contract price due to defective subcontract data of a prospective Subcontractor, when the subcontract was not subsequently awarded to such Subcontractor, will be limited to the amount (plus applicable overhead and profit markup) by which the actual Subcontractor, or actual cost to the Contractor if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor, **provided** the actual subcontract price was not affected by defective cost or pricing data.

Note: Since the contract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, it is expected that the Contractor may wish to include a clause in each such subcontract requiring the Subcontractor to appropriately indemnify the Contractor. However, the inclusion of such a clause and the terms thereof are matters for negotiation and agreement between the Contractor and the Subcontractor, **provided** they are consistent with ASPR 23-203 relating to Disputes Provisions in subcontracts. It is also expected that any Subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower tier Subcontractors.

References

ASPR 7-104.29(b) (1970 JAN)
FPR 1-3.814-1(b)

Source of Clause

Regulation and for ASPR, 10 U.S.C. §2306(f)(2) (1970) Truth in Negotiation Act, 76 Stat. §528 (1962), as amended.

Purpose of Clause

To protect the Government from being overcharged by Contractors who base their costs on defective cost or pricing data.

Comment

1. **Applicability — Price Adjustments**

   This clause becomes operative **only** if contract **modifications** occur which

   a. are **not priced** on the basis of

      i. adequate price competition

      ii. established catalogue or market prices of commercial items, **or**

      iii. prices set by law or regulation

   b. involve **aggregate** increases and/or decreases in cost of more than $100,000 (e.g. this clause would apply if a modification occurs resulting in an increase of $70,000 and an offsetting decrease of $70,000).

2. **Reduction and Modification for Defective Cost or Pricing Data**

   IF

   any negotiated price adjustment is **significantly** increased because the Contractor, a Subcontractor, or a prospective Subcontractor furnished data

   a. that was not accurate, or

   b. that was not **accurate, complete,** and **current as certified**

   THEN

   a. the price must be **reduced** accordingly, **and**

   b. the **contract** must be **modified in writing** as may be necessary to reflect such a reduction.

Flow Down

Not required. However, the ASPR and FPR suggest that the Contractor and higher-tier Subcontractors should insert indemnification clauses to protect themselves against price reductions caused by defective data submitted by their Subcontractors.

Special Notes

1. This clause is **not** required in contracts

   a. for less than $100,000 (unless the Contracting Officer determines that the circumstances require submission of cost and pricing data)

   b. which contains the ''Price Reduction for Defective Cost or Pricing Data'' clause (see its discussion)

   c. with foreign governments of their agencies **if** the requirement is waived by the head of the procuring activity or agency (who must state his reasons in writing)

2. **If** the defective data were furnished by a **prospective** Subcontractor who **did not** receive the subcontract, **then** the price reduction is limited to the amount (including overhead) by which the prospective subcontract cost estimate exceeded.

   a. the actual subcontract (provided that **it** was **not** affected by the defective data) or

   b. the actual cost to the Contractor, if there were no subcontract.

3. There is no specific standard for determining what is a **significant increase** in the **price adjustment.** Any such determination will depend upon the facts and circumstances of the individual case.

4. The amount of the price reduction is a question of fact and any failures to agree on such an amount will

D-18

D-19 RENEGOTIATION (1959 OCT)

(a) To the extent required by law, this contract is subject to the Renegotiation Act of 1951 (50 U.S.C. App. 1211, et seq.), as amended, and to any subsequent act of Congress providing for the renegotiation of contracts. Nothing contained in this clause shall impose any renegotiation obligation with respect to this contract or any subcontract hereunder which is not imposed by an act of Congress heretofore or hereafter enacted. Subject to the foregoing this contract shall be deemed to contain all the provisions required by section 104 of the Renegotiation Act of 1951, and by any such other act, without subsequent contract amendment specifically incorporating such provisions.

(b) The Contractor agrees to insert the provisions of this clause, including this paragraph (b), in all subcontracts, as that term is defined in section 103g of the Renegotiation Act of 1951, as amended.

be resolved under the ''Disputes'' clause (see its discussion). A Contractor under the ASPR must remember that the Contracting Officer is **not permitted** to consent to any Contractor's attempt to give its Subcontractor the right of **direct** appeal to the Armed Services Board of Contract Appeals. D-18

5. The Contractor should keep copies of its cost or pricing data, for the Government has the right to review its records until three years after **final** payment on the contract.

RENEGOTIATION D-19

Reference

ASPR 7-402.12 incorporates 7-103.13 (1959 OCT)

Source of Clause

Regulation, as required by the Renegotiation Act of 1951, 50 U.S.C. §§1211 et. seq.; 65 Stat. §7.

Purpose of Clause

To assure the efficient use of appropriations for national defense by providing for the elimination of excessive profits from Government defense contracts and subcontracts.

Comment

1. **Inapplicability to Cost Reimbursement Contracts with Educational Institutions**

   The provisions of the Renegotiation Act of 1951 do not apply to **Cost Reimbursement Contracts** with educational institutions exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. **However,** if the Institution, **subcontracts** in performing a Government contract, with profit-making organizations, the Act will apply to such subcontracts.

2. **General Operation of the Renegotiation Act**
   a. The Act establishes the Renegotiation Board, which is an independent agency of the executive branch of the Government, to supervise **renegotiation procedures** concerning **excessive profits.**
   b. **Excessive Profit** — the portion of profits derived from Government defense contracts and related subcontracts determined in accordance with the Renegotiation Act to be excessive. In determining excessive profits, consideration must be given to
      i. The Contractor's
         a. **Efficiency,** with regard to its attainment of quantity and quality production and reduction of costs, and
         b. **Economy** in the use of materials, facilities, and manpower,
      ii. The reasonableness of costs and profit,
      iii. The amount of public and private capital involved,
      iv. The extent of risk assumed by the Contractor,
      v. The nature and extent of the Contractor's contribution to the defense effort,
      vi. The character and complexity of the business involved, and
      vii. Such other factors that the public interest and fair dealing may require **as are published** in the regulations of the Renegotiation Board.
   c. **The Renegotiation Procedure** consists of
      i. Requiring Contractors and Subcontractors subject to the Act to file an Annual Report of Profits made during the previous year under Government contracts and their subcontracts.
      ii. Negotiation between the Renegotiation Board and the Contractor or Subcontractor to reach an **agreement** concerning the amount determined by the Board as possibly excessive.
      iii. A determination by **Board order** of the amount to be
         a. **Withheld from** the Contractor by the Government or
         b. **Repaid to** the Government by the Contractor.

         IF

         no agreement can be reached by the negotiating parties
      iv. Provision for the Contractor or Subcontractor to appeal to the Court of Claims within 90 days of

D-19

D-20 REPORTING OF ROYALTIES

If this contract involves any royalty payments in excess of $250 or if the amount of any royalty payment in excess of $250 is reflected in the estimated cost, the Contractor shall report in writing to the Contracting Officer, as soon as practicable during the performance of this contract, the amount of any royalties paid or to be paid by it directly to others in connection with the performance of this contract, together with (a) The names and addresses of licensors to whom such payments are made; (b) The patent numbers or patents application serial numbers (with filing dates) involved or other identification of the basis of such royalties; and (c) Information concerning the manner of computation of such royalties.

receiving the Board's final determination.

Flow Down

1. ''Subcontract'' defined: For the purposes of this clause, the term ''subcontract'' means
   a. **Any** purchase order or agreement for services or materials (exclusive of office supplies) required for work under the contract.
   b. **Any** contract or arrangement for the use of any patented or secret method, formula, or device in the performance of the contract.
   c. **Any** contract or arrangement which
      i. Is a contingency contract (see also, the ''Covenant Against Contingent Fees'' clause).
      ii. Involves an amount payable, such amount to be determined by reference to a Department of Defense (DOD) contract or related subcontract, **or**
      iii. Involves services which consist of soliciting or procuring DOD contracts or related subcontracts.
2. The Contractor must insert this clause in its entirety in all subcontracts. Under such, the Subcontractor agrees
   a. To the elimination of excessive profits through renegotiation.
   b. That the **Contractor may** (without liability) **withhold** excessive profits from the Subcontractor.
   c. That the **Subcontractor will repay** the Government any excessive profits it receives.
   d. To insert similar provisions in each of its subcontracts.

Special Notes

1. Even if this clause is omitted from a contract or subcontract to which the Renegotiation Act applies, such contract or subcontract will nevertheless be subject to the Act.
2. If the Renegotiation Act of 1951 is amended, such an amendment will automatically apply to a contract or subcontract covered by the 1951 act. No amendment to the contract specifically incorporating such a change in the law will be necessary.

REPORTING OF ROYALTIES

D-20

Reference

HEW 315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To help the Government determine whether any royalties paid or to be paid in connection with a Government contract are excessive, improper, or inconsistent with rights which the Government itself may have in particular inventions, patents, or patent applications.

Comment

IF

1. The contract involves any royalty payments beyond **$250, OR**
2. Any royalty payment beyond $250 is reflected in the contract's estimated cost,

THEN

The Contractor must report **in writing** to the Contracting Officer, as soon as practicable during his contract performance.

1. **The amount** of any royalties paid or to be paid to others in connection with the contract.
2. **The names and addresses** of the person(s) (licensor(s)) to whom such royalties are paid,
3. The **basis** for paying such royalties: identify by patent number or patent application serial number (with filing date) or otherwise,

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D-21 REPORTING OF ROYALTIES (FOREIGN) (1966 OCT)

(a) If this contract is in an amount which exceeds fifty thousand United States dollars ($50,000), the Contractor shall report in writing to the Contracting Officer, during the performance of this contract the amount of royalties paid or to be paid by the Contractor directly to others in the performance of this contract. The Contractor shall also (i) furnish in writing any additional information relating to such royalties as may be requested by the Contracting Officer, and (ii) insert a provision similar to this clause in any subcontract hereunder which involves an amount in excess of the equivalent of fifty thousand United States dollars ($50,000).

(b) The term ''royalties'' as used herein refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like for this use of or for rights in patents or patent applications.

4. **The method** used to compute the amount of such royalties. D-20

Flow Down

Not required. However, the Contractor should include a similar provision in any subcontracts to cover himself in case a royalty paid by the Subcontractor is later reflected in the Contractor's estimated cost.

Special Notes

None.

REPORTING OF ROYALTIES (FOREIGN) D-21

Reference

ASPR 7-403.3 incorporates 7-104.8(a)(1966 OCT)

Source of Clause

Regulation

Purpose of Clause

To require the Contractor to notify the Government of any royalties it pays or will pay so that the Government can determine whether such royalties are allowable costs under the contract.

Comment

1. **Applicability**

   This clause applies to contracts that are

   a. negotiated, **AND**
   b. to be **performed** outside the United States, its possessions, and Puerto Rico, regardless of the place of delivery, **AND**
   c. in an amount exceeding $50,000 (U.S.).

2. **Royalties and their Allowability**

   a. Definition of ''Royalties''
   For the purposes of this clause, ''royalties are any costs or charges for the use of or rights in patents or patent applications, including
      i. royalties,
      ii. license fees,
      iii. patent or license amortization costs, and
      iv. other similar costs or fees,

   b. ''Royalties'' as allowable costs
   ''Royalties'' **are** allowable costs **unless**
      i. the Government has a right or license to free use of the patent, or
      ii. the patent has been judicially or administratively determined to be invalid, or
      iii. the patent is unenforceable, or
      iv. the patent has expired (see ASPR 15-309.33).

3. **Requirements**

   IF,

   in the performance of this contract, the Contractor pays or becomes obligated to pay royalties to others,

   THEN, it must:

   a. **Report such amounts** in writing to the Contracting Officer
   b. **Furnish** in writing **additional information** relating to such royalties, as requested by the Contracting Officer.

D-21

D-22 SERVICES OF CONSULTANTS

Except as otherwise expressly provided elsewhere in this contract, and notwithstanding the provisions of the clause of this contract entitled ''Subcontracting,'' the prior written approval of the Contracting Officer shall be required:

(a) Whenever any employee of the Contractor is to be reimbursed as a ''consultant'' under this contract; and

(b) For the utilization of the services of any consultant under this contract exceeding the daily rate set forth elsewhere in this contract or; if no amount is set forth, $100, exclusive of travel costs, or where the services of any consultant under this contract will exceed 10 days in any calendar year.

Whenever Contracting Officer approval is required, the Contractor will obtain and furnish to the Contracting Officer information concerning the need for such consultant services and the reasonableness of the fees to be paid, including, but not limited to, whether fees to be paid to any consultant exceed the lowest fee charged by such consultant to others for performing consultant services of a similar nature.

D-23 SUBCONTRACTOR COST OR PRICING DATA (1970 JAN)

(a) The Contractor shall require Subcontractor hereunder to submit, actually or by specific identification in writing, cost or pricing data under the following circumstances: (i) prior to the award of any subcontract the amount of which is expected to exceed $100,000 when entered into; (ii) prior to the pricing of any subcontract modification which involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed $100,000; except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(b) The Contractor shall require Subcontractors to certify, in substantially the same form as that used in the certificate by the Prime Contractor to the Government, that to the best of their knowledge and belief, the cost and pricing data submitted under (a) above is accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract change or modification.

Flow Down D-21

Required in all subcontracts exceeding $50,000 (U.S.), or its equivalent.

Special Notes

Although DD Form 783 is the standard form for reporting information on royalty payments, the Contractor may use any other form if the information required by this clause and the Contracting Officer is included in it.

SERVICES OF CONSULTANTS

D-22

Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To protect the Government from extra costs due to excessive or unnecessary consultant fees.

Comment

1. The Contractor must get the **prior written approval** of the Contracting Officer
   a. Before he is to pay any of his employees as a ''Consultant'' under this contract.
   b. Before he shall pay for **any** services by a consultant under this contract at a **daily rate higher** than
      i. That set forth elsewhere in the contract, or if no amount is set forth,
      ii. $100.00 exclusive of travel costs
   c. Before he shall use the services of any consultant under the contract for **more than 10 days** in any calendar year.
2. In order to get the required Contracting Officer approval, the Contractor must furnish him information concerning
   a. The need for such consultant services
   b. The reasonableness of the consultant fees to be paid, including but not limited to, whether or not the fee to be paid exceeds the lowest fee the consultant charges for similar services.

Flow Down

Not Required.

Special Notes

A general ability by a Contractor to subcontract without prior approval of the Contracting Officer (see the ''Subcontracting'' clause) will **not** override this clause. However, if an express exception exists elsewhere in the contract, it will prevail.

SUBCONTRACTOR COST OR PRICING DATA

D-23

References

ASPR 7-402.32 incorporates 7-104.42(a) (1970 JAN)
FPR 1-7.202-33 incorporates 1-3.814-3(a)

Source of Clause

Regulation, and for ASPR, 10 U.S.C. §2306(f)(3),(4); Truth in Negotiation Act, 76 Stat. §528 (1962) as amended.

D-23 (c) The Contractor shall insert the substance of this clause including this paragraph (c) in each subcontract hereunder which exceeds $100,000 when entered into except where the price thereof is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. In each such excepted subcontract hereunder in excess of $100,000, the Contractor shall insert the substance of the following clause:

SUBCONTRACTOR COST OR PRICING DATA — PRICE ADJUSTMENTS

(a) Paragraphs (b) and (c) of this clause shall become operative only with respect to any modification made pursuant to one or more provisions of this contract which involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed $100,000. The requirements of this clause shall be limited to such contract modifications.

(b) The Contractor shall require Subcontractors hereunder to submit, actually or by specific identification in writing, cost or pricing data under the following circumstances: (i) prior to award of any subcontract, the amount of which is expected to exceed $100,000 when entered into; (ii) prior to the pricing of any subcontract modification which involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed $100,000; except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(c) The Contractor shall require Subcontractors to certify, in substantially the same form as that used in the certificate by the Prime Contractor to the Government, that to the best of their knowledge and belief the cost and pricing data submitted under (b) above is accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract change or modification.

(d) The Contractor shall insert the substance of this clause including this paragraph (d) in each subcontract hereunder which exceeds $100,000 when entered into.

Purpose of Clause

To protect the Government from being overcharged by requiring the submission of **Subcontractor** cost or pricing data.

Comment

1. **Applicability**

This clause is required in contracts for which the Contractor's cost or pricing data has been required. (See the ''Price Reduction'' clauses.)

2. **Submission Requirement**

To assist the Government, and to carry out the law, the Contractor must require its Subcontractors to submit — actually or by specific identification in writing — cost or pricing data prior to any

a. **subcontract** expected to exceed $100,000, **OR**
b. **subcontract modification** involving aggregate cost increases **and/or** decreases expected to exceed $100,000 (e.g. this clause would apply if a modification occurs resulting in an increase of $70,000 and a decrease of $70,000)

3. **Certifying the cost or pricing data**

The Contractor must require its Subcontractors to certify, in the same manner that it was required to (see the ''Price Reduction'' clauses), that their cost and pricing data submissions are, to the best of their knowledge and belief

a. accurate
b. complete, and
c. current

as of the date of the subcontract agreement

4. **Exceptions.** The Contractor need not require cost or pricing data when the Subcontractor's prices are based on

a. adequate price competition
b. establish catalogue or market prices of commercial items, **OR**
c. prices set by law or regulation

Flow Down

The Contractor must insert the substance of this clause in each of his subcontracts which, when entered into, exceed $100,000, except for those that are exempted by the exceptions listed above. In such cases, the Contractor must insert a clause requiring cost or pricing data submissions when a **modification** occurs involving aggregate increases and/or decreases in cost expected to exceed $100,000.

Subcontractors are required to insert the substance of this clause in their subcontracts when applicable.

Special Notes

1. The Contractor and Subcontractor should retain copies of his cost or pricing data and supporting documents, for the Government has the right to review the records of either until 3 years after final payment on the contract or subcontract.
2. This clause is not used in contracts with foreign governments, or agencies thereof, if the requirement is waived by the head of the involved agency or procuring activity (who must state the reasons for his exception in writing)
3. The clause itself does not specify **to whom** the Subcontractor must **submit** its data. Both the ASPR and the FPR, however, require that the Subcontractor submit its data to the Contractor who must review and evaluate it and then submit both the data and the results of the review to the Contracting Officer.
4. The Contractor is responsible for **updating** a prospective Subcontractor's data from its effective data (i.e. the date of the subcontract) **to** the **date of** the Contractor's **certificate** with the Contracting Officer (see ''Price Reductions'' clauses). The Contractor may therefore wish to make the dates the same, or as close together as possible.

D-24 TAXES (1960 JUL)

Any tax or duty from which the United States Government is exempt by agreement with the Government of ____________, or from which the Contractor or any Subcontractor hereunder is exempt under the laws of ____________, shall not constitute an allowable cost under this contract.

D-25 WALSH-HEALEY PUBLIC CONTRACTS ACT (1958 JAN)

If this contract is for the manufacture or furnishing of materials, supplies, articles or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

TAXES

D-24

Reference

ASPR 7-403.19 incorporates 7-204.24(a) (1960 JUL)

Source of Clause

Regulation

Purpose of Clause

To secure for the Government the full benefits of tax agreements made with foreign governments by not recognizing as allowable costs payments by a Contractor of an unrequired foreign tax.

Comment

1. In general, taxes are an allowable cost of the Contractor **IF**, it:
   a. is required to pay them; and
   b. pays or accrues them in accordance with generally accepted accounting principles.
2. In many foreign countries, U.S. Government Contractors are exempt from certain taxes because of:
   a. tax agreements exempting U.S. expenditures for the common defense; or
   b. foreign tax relief granted in order to promote or subsidize exports.
3. The Contractor 's payment of a tax or duty, to a foreign government is **not** an allowable cost if:
   a. The U.S. Government is exempt from that tax; or
   b. The Contractor or Subcontractor is exempt from that tax.
4. Where this clause is to be used, the Contracting Officer shall put in the contract file detailed information of the specific taxes and amounts, normally payable, from which the U.S. Government is exempt.

Flow Down

Not required, but the Contractor should inform any Subcontractor of this limitation.

Special Notes

1. This clause may be excluded from a contract for less than $1,000 when the Contracting Officer determines that the administrative costs of securing relief from such foreign taxes are out of proportion to the relief available.
2. Even though this clause is absent from FPR and the HEW compilation, payment of foreign taxes for which exemptions are available would not constitute a reimbursable cost. See FPR 1-15.309-42.
3. The term Subcontractors as used above refer only to U.S. citizens and corporations organized under the laws of the several states.

WALSH — HEALEY PUBLIC CONTRACTS ACT

D-25

References

ASPR 7-402.15, incorporates 7-103.17 (1958 JAN)
FPR 1-7.202-17 incorporates 1-12.605
HEW-315 (Rev. 12/72)

Source of Clause

Regulation, as required by the Walsh-Healey Public Contracts Act of 1936, 41 U.S.C. §§35-45, 49 Stat. §§2036-2040 as amended.

Purpose of Clause

To provide conditions by which the Government purchases supplies and enters contracts for such purchases with manufacturers and dealers.

Comment

1. **Applicability of the Act and Clause.**

   IF

   a Government contract is,

   a. For the manufacture or furnishing of materials, supplies, articles or equipment, **AND**
   b. exceeds or may exceed $10,000.

   THEN

   the contract by reference incorporates,

   a. the requirements and stipulations of the Act, **AND**
   b. the regulations issued thereunder by the Secretary of Labor.

2. **Coverage and Requirements of the Act**

   a. The act covers Contractors who are (as defined in 41 CFR §50-201.101)
      i. ''Manufacturers'' of or
      ii. ''Regular Dealers'' in
      the supplies and materials which the Government may purchase under the contract.

   b. Such a Contractor must agree to
      i. pay its employees no less than the industry's prevailing minimum wage (as determined by the Secretary of Labor)
      ii. not allow its employees to work overtime in the production of materials for the contract
      iii. not hire males under 16, females under 18, or convict labor, and
      iv. provide safe and sanitary working conditions

3. **This clause does not apply to educational institutions** involved in research and development contracts because they are **not** ''manufacturers'' or ''regular dealers'' as required by the Act and defined by the Secretary of Labor

Flow Down

Not required.

Special Notes

None.

SECTION E
CONTRACT FINANCING

E-1 ADVANCE PAYMENT (1973 APR)

(1) **Amount of Advance.** At the request of the Contractor, and subject to the conditions hereinafter set forth, the Government shall make an advance payment, or advance payments from time to time, to the Contractor. No advance payment shall be made (i) without the approval of the office administering advance payments (hereinafter called the ''Administering Office'' and designated in paragraph (14)(d) below) as to the financial necessity therefor; (ii) in an amount which together with all advance payments theretofore made, shall exceed the amount stated in paragraph (14)(a) below; and (iii) without a properly certified invoice or invoices.

(2) **Special Bank Account.** Until all advance payments made hereunder, and interest charges, are liquidated and the Administrating Office approves in writing the release of any funds due and payable to the Contractor, all advance payments and all other payments under the contract shall be made by check payable to the Contractor and be marked for deposit only in a Special Bank Account with the bank designated in paragraph (14)(b) below. No part of the funds in the Special Bank Account shall be mingled with other funds of the Contractor prior to withdrawal thereof from the Special Bank Account as hereinafter provided. Except as hereinafter provided, each withdrawal shall be made only by check of the Contractor countersigned on behalf of the Government by the Contracting Officer, or such other person or persons as he may designate in writing (hereinafter called the ''Countersigning Agent'').

[When considered not reasonably necessary for the protection of the Government, the countersignature requirement may be waived for Contractors who are financially strong, with good performance records and good past experience with regard to contract cost disallowances. In such cases, the following sentence may be added to paragraph(2)]:

Until otherwise determined by the Administering Office, countersignature on behalf of the Government will not be required.

(3) **Use of Funds.** The funds in the Special Bank Account may be withdrawn by the Contractor solely for the purposes of making payments for items of allowable cost as defined in Article .... of this contract, or to reimburse the Contractor for such items of allowable cost, and for such other purposes as the Administering Office may approve in writing. Any interpretation required as to the proper use of funds shall be made in writing by the Administering Office.

(4) **Return of Funds.** The Contractor may at any time repay all or any part of the funds advanced hereunder. Whenever so requested in writing by the Administering Office, the Contractor shall repay to the Government such part of the unliquidated balance of advance payments as shall in the opinion of the Administering Office be in excess of current requirements, or (when added to total advances previously made and liquidated) in excess of the amount specified in paragraph 14(a). In the event the Contractor fails to repay such part of the unliquidated balance of advance payments when so requested by the Administering Office, all or any part thereof may be withdrawn from the Special Bank Account by checks payable to the Treasury of the United States signed solely by the Countersigning Agent and applied in reduction of advance payments then outstanding hereunder.

(5) **Liquidation.** If not otherwise liquidated, the advance payments made hereunder and interest charges, if any, shall be liquidated as herein provided. When the sum of all payments under this contract, other than advance paments, plus the estimated cost of $ .... for the work under this contract (not including fixed fee, if any), or such lesser amount to which the total estimated cost under this contract may have been reduced, plus increases, if any, in this total estimated cost not exceeding, in the aggregate, $.............. **(Insert not more than ten percent (10%) of estimated costs stated above)**, (including, without limitation, reimbursable costs incident to termination for the convenience of the Government as estimated by the Contracting Officer), the Government shall thereafter withhold further payments to the Contractor and apply the amounts withheld against the Contractor's obligation to repay such advance payments and interest charges, until such advance payments and interest charges shall have been fully liquidated. If upon completion or termination of the contract all advance payments and interest charges have not been fully liquidated, the balances thereof shall be deducted from any sums otherwise due or which may become due to the Contractor from the Government, and any deficiency shall be paid by the Contractor to the Government upon demand.

(6) **Interest Charge.** If required in paragraph (14)(c) below and at the rate therein specified, the Contractor shall pay interest to the Government upon the daily unliquidated balance of advance payments made under this contract. If the full amount of such interest is not paid by deduction or otherwise upon the completion or termination of this contract, the deficiency shall be paid by the Contractor to the Government upon demand. Interest at the rate specified in paragraph (14)(c) shall be computed at the end of each calendar month in the manner herein specified on the average daily balance of the principal of the advance payments outstanding. Notwithstanding monthly computation, interest shall be computed for the actual number of days involved, on the basis of a 365 — or 366 — day year as the case may be. In determining such balance, (1) charges on account of the advance payments to the Contractor shall be made as of the date of the checks therefor, and (2) credits resulting from deductions from cost reimbursements shall be made upon the approval of the vouchers by the Disbursing Officer, as of the dates respectively upon which the Contractor presents to the Contracting Officer or his duly authorized representative full and accurate data for the preparation of each such voucher, which date as to each such voucher shall be certified by the Contracting Officer or his duly authorized representative. Also, in determining such balance, credits arising from cash repayments to the Government by the Contractor shall be made as of the date the checks therefor are received by the Disbursing Officer. As soon as such monthly computations shall have been made, the interest charge so determined shall be deducted from any payments otherwise due to the Contractor under the contracts on which advance payments have been made. In the event the accrued interest exceeds any such payment, the excess of such interest shall be carried forward and deducted from subsequent payments on account of the contract price or fixed fee as the case may be. The interest shall not be compounded, and shall, subject to the provisions of paragraph (11) hereof, cease to accrue with respect to each contract upon which advance payments are outstanding hereunder, upon termination of such contract for other than the

ADVANCE PAYMENTS

References

ASPR 7-403.20 incorporates 7-104.34 (1973 APR) (see also Appendix E — Part 4)
FPR 1-7.203-11 incorporates 1-30.414-2 in accordance with 1-30.4

Sources of Clause

ASPR: Regulation permitted by 10 U.S.C. §2307 (1970) P.L. 85-800 §9; see also 50 U.S.C. §§1431-1435 (1970) and Executive Order 10789, ''Contracting Authority of Government Agencies in Connection with National Defense Functions.'' Nov. 14, 1958, as amended by Executive Orders 11051 (Sept. 27, 1962), 11382 (Nov 28, 1967) and 11610 (July 22, 1971).

FPR: Regulation permitted by 41 U.S.C. §255 (1970), P.L. 85-800 §4.

Purpose of Clause

To permit payment to the Contractor in advance of completion of the contract work.

Comment

1. Obtaining Advance Payments
   a. Application by the Contractor

      The Contractor may apply to the Contracting Officer for advance payments at the time of the contract **or later.** Its application must be in writing and must include:
      1. A forecast of its cash flow **on the contract involved**
      2. The proposed amount of advance payments
      3. The name and address of the bank which will hold its Special Bank Account
      4. Such other information and data about itself **as may be appropriate** under the circumstances: such generally focuses on
         a. The Contractor's reliability
         b. The Contractor's technical capability
         c. The adequacy of the Contractor's accounting system and controls.

   b. Standards for Granting Advance Payments

      The granting of advance payments to educational institutions participating in research and development contracts may be recommended when
      1. Such are necessary to supplement other funds or credit available to a Contractor or prospective Contractor.
      2. The Contractor or prospective Contractor is otherwise qualified for the contract.
      3. There will be a benefit to the Government from the Contractor's performance.
2. Limitations on the Amount of Advance Payments

   No advance payments will be made to a Contractor
   a. Unless the Administrative Office designated in the contract approves the financial necessity for such.
   b. Beyond the total amount specified in the contract.
   c. Without a properly certified invoice(s).
3. Control of Funds Given As Advance Payments
   a. Special Bank Account Requirement
      1. **Before getting** any advance payment, the Contractor must agree with a bank to set up a ''Special Bank Account.''
         a. **The Bank** must be either
            1. A Federal Reserve System Member or
            2. ''Insured'' within the meaning of the Federal Deposit Insurance Corporation Act.
         b. **The Agreement**
            1. Must be in triplicate and transmitted to the Administrative Office.
            2. Must set forth the responsibilities of the bank
            3. Must state the special character of the account.

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fault of the Contractor, or upon the date found by the Contracting Officer to be the date upon which the Contractor completed his performance under the contract.

(7) **Bank Agreement.** Before an advance payment is made hereunder, the Contractor shall transmit to the Administering Office, in the form prescribed by such office, an Agreement in triplicate from the bank in which the Special Bank Account is established, clearly setting forth the special character of the account and the responsibilities of the bank thereunder. Wherever possible, such bank shall be a member bank of the Federal Reserve System, or an ''insured'' bank with the meaning of the Act creating the Federal Deposit Insurance Corporation (Act of August 23, 1935, 49 Stat. 684, as amended; 12 U.S.C. 264).

(8) **Lien on Special Bank Account.** The Government shall have a lien upon any balance in the Special Bank Account paramount to all other liens, which lien shall secure the repayment of any advance payments made hereunder together with interest charges thereon.

(9) **Lien on Property Under Contract.** Any and all advance payments made under this contract, together with interest charges thereon, shall be secured, when made by a lien in favor of the Government, paramount to all other liens, upon the supplies or other things covered by this contract and on all material and other property acquired for or allocated to the performance of this contract, except to the extent that the Government by virtue of any other provision of this contract, or otherwise, shall have valid title to such supplies, materials, or other property as against other creditors of the Contractor. The Contractor shall identify by marking or segregation all property which is subject to a lien in favor of the Government by virtue of any provision of this contract in such a way as to indicate that it is to such lien and that it has been acquired for or allocated to the performance of this contract. If for any reason such supplies, materials, or other property are not identified by marking or segregation, the Government shall be deemed to have a lien to the extent of the Government's interest under this contract on any mass of property with which such supplies, materials, or other property are commingled. The Contractor shall maintain adequate accounting control over such property on his books and records. If at any time during the progress of the work on the contract it becomes necessary to deliver any item or items and materials upon which the Government has a lien as aforesaid to a third person, the Contractor shall notify such third person of the lien herein provided and shall obtain from such third person a receipt, in duplicate, acknowledging, inter alia, existence of such lien. A copy of each receipt shall be delivered by the Contractor to the Contracting Officer. If this contract is terminated in whole or in part and the Contractor is authorized to sell or retain termination inventory acquired for or allocated to this contract, such sale or retention shall be made only if approved by the Contracting Officer, which approval shall constitute a release of the Government's lien hereunder to the extent that such termination inventory is sold or retained, and to the extent that the proceeds of the sale, or the credit allowed for such retention on the Contractor's termination claim, is applied in reduction of advance payments then outstanding hereunder.

(10) **Insurance.** The Contractor represents and warrants that he is now maintaining with responsible insurance carriers, (i) insurance upon his own plant and equipment against fire and other hazards to the extent that like properties are usually insured by others operating plants and properties of similar character in the same general locality; (ii) adequate insurance against liability on account of damage to persons or property; and (iii) adequate insurance under all applicable workmen's compensation laws. The Contractor agrees that, until work under this contract has been completed and all advance payments made hereunder have been liquidated, he will (i) maintain such insurance; (ii) maintain adequate insurance upon any materials, parts, assemblies, subassemblies, supplies, equipment and other property acquired for or allocable to this contract and subject to the Government lien hereunder; and (iii) furnish such certificates with respect to his insurance as the Administering Office may from time to time require.

(11) **Default Provisions.** Upon the happening of any of the following events of default, (i) termination of this contract by reason of fault of the Contractor; (ii) a finding by the Administering Office that the Contractor (a) has failed to observe any of the covenants, conditions or warranties of these provisions or has failed to comply with any material provision of this contract, or (b) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract, or (c) has allocated inventory to this contract substantially exceeding reasonable requirements, or (d) is delinquent in payment of taxes or of the costs of performance of this contract in the ordinary course of business; (iii) appointment of a trustee, receiver or liquidator for all or a substantial part of the Contractor's property, or institution of bankruptcy, reorganization, arrangement or liquidation proceedings by or against the Contractor; (iv) service of any writ of attachment, levy of execution, or commencement of garnishment proceedings with respect to the Special Bank Account; or (v) the commission of an act of bankruptcy; the Government, without limiting any rights which it may otherwise have, may, in its discretion and upon written notice to the Contractor, withhold further withdrawals from the Special Bank Account and withhold further payments on this contract. Upon the continuance of any such events of default for a period of thirty (30) days after such written notice to the Contractor, the Government may, in its discretion, and without limiting any other rights which the Government may have, take the following additional actions as it may deem appropriate in the circumstances; (a) withdraw all or any part of the balance in the Special Bank Account by checks payable to the Treasurer of the United States signed solely by the Countersigning Agent and apply such amounts in reduction of advance payments then outstanding hereunder and in reduction of any other claims of the Government against the Contractor; (b) charge interest on advance payments outstanding during the period of any such default at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT 97 for the Renegotiation Board; (c) demand immediate repayment of the unliquidated balance of advance payments hereunder; or (d) take possession of and, with or without advertisement, sell at public sale at which the Government may be the purchaser, or at a private sale, all or any part of the property on which the Government has a lien under this contract and, after deducting any expenses incident to such sale, apply the net proceeds of such sale in reduction of the unliquidated balance of advance payments hereunder and in reduction of any other claims of the Government against the Contractor.

2. The Special Bank Account
    a. All advance and regular contract payments must be deposited in this account.
    b. Funds in this account must stay separate from any other of the Contractor's funds.
    c. Withdrawals from this account may be made **only** by the Contractor's check **countersigned by the Contracting Officer** (or other person designated in writing) unless otherwise determined by the Administering Office.

b. Use of Funds

The funds in the Special Bank Account may be withdrawn by the Contractor **ONLY**

1. To make payments on allowable costs
2. To reimburse the Contractor for such costs
3. For other purposes as the Administrative Officer may approve in writing.

c. Return of Funds

1. When desired by the Contractor,

    The Contractor may at any time repay the advanced funds.

2. When requested **in writing** by the Administering Office,

    The Contractor must repay advanced funds which are — **in the opinion of the Administering Office**

    a. In excess of current requirements
    b. In excess of the original specified amount

3. If the Contractor fails to repay any requested amount, all or any part of the amount in the Special Bank Account
    a. May be withdrawn by the Government
    b. And applied toward reducing the outstanding part of the advance payments.

d. Interest On Advance Payments

1. The parties may agree that no interest will be charged on the advance payments (**unless** default occurs), **OR**
2. Interest of 6% a year may be charged. If so, it will be
    a. **Computed,**
        1. At the end of each calendar month (or # of days involved)
        2. On the average daily balance of the outstanding principal (such balance to be determined according to contract specifications)
        3. Without compounding.
    b. **Deducted** from any advance or other payments which the Government owes or will owe the Contractor, and
    c. **Eliminated** on the date of
        1. Termination of the contract for any reason **other than** the Contractor's fault
        2. Completion of the contract, **as found by the Contracting Officer.**

e. Liquidation

1. The **Government will withhold** any advance or other payments not yet made and apply them to the Contractor's outstanding debt.
    a. When the sum of the payments (**NOT** including advances) made under the contract exceed an amount **previously agreed upon by the parties,** or
    b. At termination or completion of the contract.
2. The **Contractor must pay** the Government any further amounts due (including interest, if applicable) on his debt at the time of termination or completion.

4. Security for the Advance Payments

a. Liens and Management of Lien Property

1. **Placement of the first Lien**

    In order to secure repayment of the advance (and any interest on it), the Government must be given a first lien on

    a. Any balance in the Special Bank Account
    b. The supplies or other things covered by the contract
    c. All material or other property acquired for or allocated to the work under the contract (**EXCEPT** if the Government **already** has valid title to the property — see ''Government Property'').

E-1 (12) **Prohibition Against Assignment.** Notwithstanding any other provision of this contract, the Contractor shall not transfer, pledge, or otherwise assign this contract, or any interest therein, or any claim arising thereunder, to any party or parties, bank, trust company, or other financing institution.

(13) **Information — Access to Records.** The Contractor shall furnish to the Administering Office signed or certified balance sheets and profit and loss statements monthly, or at such other intervals as may be required, together with a monthly report on the operation of the Special Bank Account in prescribed form, and such other information concerning the operation of the Contractor's business as may be requested. The Contractor shall afford to authorized representatives of the Government proper facilities for inspection of the Contractor's books, records and accounts.

(14) **Designations and Determinations.**

(a) **Amount.** The amount of advance payments at any time outstanding hereunder shall not exceed$ .... **[or alternatively:]**

(a) **Amount.** The aggregate amount of the advance payments to be made hereunder (less the aggregate amounts paid or withdrawn pursuant to paragraph (4)) shall not exceed $............

(b) **Depository.** The bank designated for the deposit of payments made hereunder shall be ....

(c) **Interest Charge.** Interest shall be charged in the manner provided herein at the rate of six percent per annum. **[In the case of advance payments made without interest, insert the following:]** No interest shall be charged for advance payments made hereunder, except as provided for in paragraph (11)(b). The Contractor shall charge interest at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT 97 for the Renogotiation Board; on subadvances or down payments to Subcontractors, and such interest will be credited to the account of the Government. However, interest need not be charged on subadvances on nonprofit subcontracts with nonprofit educational or research institutions for experiment, research or development work.

(d) **Administering Office.** The office administering advance payments is designated as ....

(15) **Other Security.** The terms of this contract shall be considered adequate security for advance payments hereunder, except that if at any time the Administering Office deems the security furnished by the Contractor to be inadequate, the Contractor shall furnish such additional security as may be satisfactory to the Administering Office, to the extent that such additional security is available.

(16) **Representations and Warranties.** To induce the making of the advance payments, the Contractor represents and warrants that —

(a) The balance sheet, the profit and loss statement and any other supporting financial statements, heretofore furnished to the Administering Office, fairly reflect the financial condition of the Contractor at the date shown on said balance sheet and the results of the operation for the period covered by the profit and loss statement, and since said date there has been no materially adverse change in the financial condition of the Contractor.

(b) No litigation or proceedings are presently pending or threatened against the Contractor, except as shown in the above statements.

(c) The Contractor, apart from liability resulting from the renegotiation of defense production contracts, has no contingent liabilities not provided for or disclosed in the financial statements furnished to the Administering Office.

(d) None of the provisions herein contravenes or is in conflict with the authority under which the Contractor is doing business or with the provision of any existing indenture or agreement of the Contractor.

(e) The Contractor has the power to enter into this contract and accept advance payments hereunder, and has taken all necessary action to authorize such acceptance under the terms and conditions of this contract.

(f) None of the assets of the Contractor is subject to any lien or encumbrance of any character except for current taxes not delinquent, and except as shown in the financial statements furnished by the Contractor to the Administering Office. There has been no assignment of claims under any contract affected by these advance payment provisions, or if there has been any assignment, such assignments have been terminated.

(g) All information furnished by the Contractor to the Administering Office in connection with each request for advance payments is true and correct.

(h) These representations and warranties shall be continuing, and shall be deemed to have been repeated by the submission of each invoice for advance payments. (MAY 1959)

(17) **Subadvances.** Substantially, the following provision should be included in the contract when subadvances are contemplated:

Subject to the prior written approval of the Administering Office, funds from the Special Bank Account may be used by the Contractor to make advance payments or down payments to Subcontractors and materialmen in advance of performance by the Subcontractor or materialman. Such subadvances shall not exceed .... percent of the subcontract price or estimated cost as the case may be, and the Subcontractors or materialmen to whom such advances are made shall furnish adequate security therefor. Unless other security is required by the Administrating Office, covenants in subcontracts, expressly made for the benefit of the Government providing for a Special Bank Account for the subadvance, with Government lien thereon, and providing for Government lien, paramount to all other liens, on all property under such subcontract, and imposing upon the Subcontractor and the depository bank substantially the same duties and giving the Government substantially the same rights as are provided herein (and in the Agreement for Special Bank Account supplementary hereto) between the Government, the Contractor and the Bank, may be considered as adequate security for such subadvance.

2. Identification on the First-Lien Property
    a. The Contractor must segregate or mark all property subject to the Government's first lien in order to show that the property
        1. Is subject to such a lien
        2. Has been acquired for or allocated to the contract.
    b. **If** the Contractor does not identify such property **the Government** automatically **has a lien** — to the full extent of its interest — **on all property** with which the first-lien property is mixed.
3. Accounting Control

    The Contractor must keep accounting control over the ''first-lien'' property.
4. Third Party Transactions

    If the Contractor, at any time during the contract, delivers ''first-lien'' property to a third person, it must
    a. Tell the third person of the lien
    b. Get — in duplicate — the third person's acknowledgement of the lien.
    c. Deliver a copy of the acknowledgement to the Contracting Officer.
5. Termination

    Upon termination the Contractor may sell or retain any ''Termination Inventory'' (see ''Terminations'' clause) **IF**
        a. It is authorized to do so by the contract (see ''Terminations'' clause) **AND**
        b. It will maintain adequate insurance on **all property subject to the Government's first lien release the Government's lien), AND**
        c. The proceeds of the sale (or credit for retention) are used to reduce any still-outstanding advances.

b. Insurance
    1. Presently Maintained Insurance

        The Contractor, **at the time of the contract,** must be maintaining
        a. Normal fire and hazard insurance
        b. Adequate personal and property damage liability insurance
        c. Adequate Workmen's Compensation Insurance (as required by law).
    2. Insurance Required During the Contract Period

        The Contractor agrees that until the contract is completed and all advances are repaid
        a. It shall continue to maintain the insurance required at the date of the contract.
        b. It will maintain adequate insurance on **all property subject to the Government's first lien**
        c. Furnish proof of such insurance to the Administering Office, if required.

c. Prohibition of Assignment

    Regardless of any other clause in the contract, the Contractor must agree **not** to
    1. Transfer,
    2. Pledge, or
    3. Assign

the contract or any interest in it to **ANY** other party.

d. Government Access to the Contractor's Records
    1. The Contractor shall furnish **monthly** (**or** as otherwise required) to the Administering Office
        a. Signed or certified balance sheets and income statements
        b. Prescribed reports on the Special Bank Account
        c. Any other information requested about the Contractor's business.
    2. The Contractor will give Government representatives assistance in any inspection of its books, records, and accounts (see also ''Inspection, Examination of Records'' clauses).

e. Protection of the Government in Case of Contractor Default
    1. At the Time of Default

        The **Government** (without limiting any of its other rights) **may**, after giving **written** notice, **prevent withdrawals** from the Special Bank Account and **withhold payments** under the contract **IF**
        a. The contract is terminated and the Contractor is at fault
        b. The Administering Officer finds that the Contractor

E-1 (18) **Covenants.** The following are examples of some special provisions (subject to modification to adapt to the circumstances of individual cases) that may be utilized when and to the extent deemed appropriate in particular cases.

During the period of time that advance payments may be made hereunder and so long as any such advance payments remain unliquidated, the Contractor shall not, without the prior written consent of the Administering Office:

(a) Mortgage, pledge, or otherwise encumber, or suffer to be encumbered, any of the assets of the Contractor now owned or hereafter acquired by him, or permit any preexisting mortgages, liens, or other encumbrances to remain on or attach to any assets of the Contractor which are allocated to the performance of this contract and with respect to which the Government has a lien hereunder;

(b) Sell, assign, transfer, or otherwise dispose of accounts receivable, notes or claims for money due or to become due;

(c) Declare or pay any dividends, except dividends payable in stock of the corporation, or make any other distribution on account of any shares of his capital stock, or purchase, redeem, or otherwise acquire for value any such stock, except as required by sinking fund or redemption arrangements reported to the Administering Office incident to the establishment of these advance payment provisions;

(d) Sell, convey, or lease all or a substantial part of his assets;

(e) Acquire for value the stock or other securities of any corporation, municipality, or governmental authority, except direct obligations of the United States;

(f) Make any advance or loan to or incur any liability as guarantor, surety, or accommodation endorser for any other firm, person, or corporation;

(g) Permit a writ of attachment or any similar process to be issued against his property without procuring release thereof or bonding the same within 30 days after the entry of the writ of attachment or any similar process;

(h) Pay any salaries, commissions, bonuses, or other remuneration in any form or manner to his directors, officers, or key employees in excess of existing rates of payments or of rates provided in existing agreements, in connection with which notice has been given to the Adminstering Office, or accrue such excess remuneration without first obtaining an agreement subordinating the same to all claims of the Government hereunder, or employ any person at a rate of compensation in excess of $........... per annum;

(i) Make any substantial change in management, ownership, or control of the corporation;

(j) Merge or consolidate with any other firm or corporation, change the type of his business or engage in any transaction outside the ordinary course of his business as presently conducted;

(k) Deposit any of his funds except in a bank or trust company insured by the Federal Deposit Insurance Corporation;

(l) Create or incur indebtedness for borrowed money or advances other than advances to be made hereunder, except as specified herein;

(m) Make or covenant himself to make capital expenditures exceeding in the aggregate $...........;

(n) Permit his net current assets, calculated in accordance with Cenerally Accepted Accounting Principles, to become less than $..............; or

(o) Make any payments on account of the obligations listed below, except in the manner and to the extent herein provided.

1. Has failed to observe any of the advance payment covenants, conditions, or warranties, (see infra)
2. Has failed to comply with a material provision of the contract
3. Has failed to make progress on the contract.
4. Is in such bad financial shape that it endangers the contract.
5. Has unreasonably overcharged inventory to the contract.
6. Is delinquent in paying taxes or other costs.

c. The Contractor is undergoing bankruptcy, reorganization, arrangement, or liquidation.
d. The Contractor has been sued by creditors over the Special Bank Account.

2. 30 Days After The Government's Written Notice

   If any of the defaulting events continue for 30 days, the Government, in addition to any of its other rights, may

   a. Withdraw all or part of the Special Bank Account, using the proceeds to reduce outstanding advances.
   b. Charge interest on advances still outstanding (under ASPR at a rate established by the Secretary of the Treasury (under FPR at 6%))
   c. Demand immediate repayment of the balance due on the advance.
   d. Take possession of and sell, as it sees fit, the property on which it has the first lien, using the proceeds to reduce **any** claim it has against the Contractor.

5. The Contractor's Warranties and Covenants
   a. Required Warranties

      The Contractor must warrant that

      1. The financial statements it gives to the Administering Office fairly reflects its present financial condition.
      2. No undisclosed litigation is pending or threatened against it.
      3. It has no undisclosed contingent liabilities.
      4. None of the provisions of the contract conflicts with any arrangement — legal or contractual — under which it operates.
      5. None of its assets are subject to any undisclosed liens or encumbrances.
      6. It has made no assignment of claims under any contract affected by the advance payment.
      7. All of its information is true.
      8. Its warrants shall **continue with each invoice** for the advance payments
   b. Optional Covenants
      1. The Contracting Officer may, depending on the individual case, require other covenants by the Contractor in order to protect the Government's interest in the advances.
      2. These usually force the Contractor to get the written consent of the Administering Office before it does anything which may affect its ability to repay the Government.
      3. Examples of these optional covenants are in the ASPR clause, paragraph 18.

Flow Down

Required, if the Contractor is **contemplating** giving any advances to Subcontractors (see paragraph 17).

With the written approval of the Administering Office, the Contractor may use funds from the Special Bank Account for advances to Subcontractors and materialmen. Such an advance:

a. May not exceed a specified percentage of the subcontract price.
b. Must be adequately secured by the Subcontractor or materialmen.
c. Must (unless otherwise stated by the Administering Office) be deposited in a Special Bank Account, under an agreement of its own.
d. Must be secured by Government first liens on
   1. The Special Bank Account
   2. All property under the subcontract

The Contractor is required to charge interest on advance payments on all subcontracts except those with nonprofit educational or research institutions for experimental, research, or development work.

Special Notes

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E-2 ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payments aggregating $1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under the contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payments to assignee of any moneys due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or setoff. (The preceding sentence applies only if this contract is made in time of war or national emergency as defined in said Act and is with the Department of Defense, the General Services Administration, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, or any other department or agency of the United States designated by the President pursuant to clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, or marked ''Top Secret,'' ''Secret'', or ''Confidential,'' be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

1. If there is any question whether a proposed use of the advance payments is proper, it must be resolved **in writing** by the Administering Office. E-1

2. When the Contracting Officer approves the Contractor's sale or retention of ''Termination Inventory,'' such approval releases the Government's first lien on the property. Even though not required, the Contractor is advised **to get that approval in writing.**

3. The Advance Payments clause **must specify**
   a. The **limits** on
      1. The amount of **outstanding** advances allowed
      2. The **total amount** of advances to be made
   b. The **Bank** which will hold the Special Bank Account
   c. The **interest** charge, if any

4. **If at any time** the Administering Office determines that the security given for the advance payments is not enough, it may require **more** from the Contractor (to the extent such is available).

ASSIGNMENT OF CLAIMS

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References

ASPR 7-402.6 incorporates 7-103.8 (1962 FEB)
FPR 1-7.202.6 incorporates 1-30.703
HEW-315 (Rev. 12/72)

Source Of Clause

Regulation pursuant to the Assignment of Claims Act of 1940, 31 U.S.C. §203, 54 Stat. §102(a); 41 U.S.C. §15, 65 Stat. §41.

Purpose Of Clause

To permit Contractors to obtain private financing by assigning their claims for monies due or to become due under their contracts to financial institutions.

Comment

1. A Contractor may assign his claims for monies due or to become due under his contract if,
   a. The contract provides for payments totalling $1,000 or more,
   b. The payments are assigned to a bank, trust company, or other financial institution, including any federal lending agency,
   c. Such an assignment covers **all** amounts payable under the contract and not already paid,
   d. The assignment is made to only one party, except that it may be made to one party as agent or trustee for two parties participating in the financing.
2. The financial institution to which an assignment is made
   a. Must forward to the administrative Contracting Officer, the disbursing officer and the surety, if any, the notice and instrument of assignment in the number of copies required by the Assignment of Claims Act of 1940 and ASPR, **AND**
   b. Shall **not** have to repay the Government any amount received under the assignment because of **any** liability to the Government incurred by the Contractor, **BUT**
   c. May have payments of assigned monies due or to become due under the contract **reduced** or **set-off** by any liability which the Contractor owes the Government.

Flow Down

Not required. A subcontract term that purports to prohibit a Subcontractor from assigning sums due or to become due under subcontracts for the purchase of supplies, construction contracts, and the like, or to constrain the Subcontractor's choice of assignees would be ineffectual in jurisdictions that have adopted the Uniform Commercial Code. See UCC 9-318(9). However, the Contractor may require in its purchase orders or subcontracts that assignments against them be filed in a prescribed way which reasonably identifies the sums assigned and evidences the making of the assignment. See U.C.C. 9-318(3).

Special Notes

1. If the financial institution **releases** the Contractor from the assignment of claims, the Contractor must file a written notice of release **and** a copy of the instrument of release with the administrative Contracting Officer, the disbursing officer and the surety in order to receive payment of the balance due under the contract.
2. **Prior written Authorization** of the Contracting Officer is required before any assignee may see any part of the contract marked ''top secret'', ''secret'', or ''confidential''. No such marked plans, specifications, or other similar documents relating to work under this contract shall be furnished to the assignee.
3. During a war or a proclaimed national emergency, contracts with the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other Governmental agency designated by the President usually allow for assignments which provide that ''monies due or to become due'' under the contract **may not be reduced or set-off** because of the Contractor's liabilities to the Government **if** such liabilities,
    a. arise independently of the contract,
    b. arise from (or independently of) the contract if they are due to
        i. renegotiations,
        ii. fines,
        iii. penalties (except if due to failure to comply with the contract), or
        iv. taxes.

See Clause 4 of the proviso of Section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. §41.

SECTION F
INSPECTION AND REPORTS

F-1 DOCUMENTATION OF SCIENTIFIC AND TECHNICAL REPORTS (1966 AUG)

A DD Form 1473 (DOCUMENT CONTROL DATA — R&D), completed in accordance with the instructions contained thereon, shall be included with each copy of scientific and technical reports required to be submitted under this contract.

F-2 INSPECTION (1959 FEB)

The Government, through any authorized representatives, has the right at all reasonable times, to inspect, or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any inspection, or evaluation is made by the Government on the premises of the Contractor or a Subcontractor, the Contractor shall provide and shall require his Subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government representatives in the performance of their duties. All inspections and evaluations shall be performed in such manner as will not unduly delay the work.

DOCUMENTATION OF SCIENTIFIC AND TECHNICAL REPORTS

F-1

Reference

Air Force, ASPR Sup (1970 JAN)

Source of Clause

Regulation

Purpose of Clause

To facilitate the storing and use of information by requiring a standardized format for it. To provide accurate information for use in public announcements.

Comment

1. When submitting required scientific and technical reports, the Contractor must include a **completed** DD Form 1473 with **each** copy of the reports.
2. The information required by DD Form 1473 includes among other things:
   a. Names of authors and their affiliations
   b. Various identifying numbers, date, and addresses
   c. Security classification information
   d. An abstract (not to exceed 200 words) of the information in the report
   e. Key words, to be used as index entries for cataloging.
3. Since the DD Form 1473 is to be used in preparing announcements, bibliographies and data banks it should be prepared in a way that allows it to be unclassified, if possible.

Flow Down

Not required.

Special Notes

None.

INSPECTION

F-2

Reference

ASPR 7-402.5(b) (1959 FEB)

Source of Clause

Regulation

Purpose of Clause

To permit the Government to evaluate the work and inspect the premises in which the work is being performed so as to assure compliance with the terms of the contract or subcontract.

Comment

1. The Government has the right, at all reasonable times,
   a. To inspect and evaluate the work performed or being performed under the contract.
   b. To inspect the premises in which the work has been and is being performed. This applies to both Contractors and Subcontractors.
2. If an inspection is made of the premises **where** the work is being done.
   a. The Contractor shall provide all reasonable facilities and assistance for the safety and convenience of

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F-2

F-3 INSPECTION AND REPORTS

(a) **Inspection of work.** The Government shall have the right to inspect the work and activities under this contract, including, without limitation, premises where any Government property may be located, at such reasonable times and in such manner as it may deem appropriate and the Contractor shall afford the Government proper facilities and assistance for such inspection.

(b) **Reports.** The Contractor shall furnish such progress reports, schedules, financial and cost reports, and other reports concerning the work under this contract as specified elsewhere in this contract. Cost and other financial data and projections furnished pursuant to this paragraph (b) shall not relieve the Contractor of the requirements for furnishing notice specified in the clause of this contract entitled, ''Limitation of Cost.''

of the inspectors.

b. The Contractor shall require his Subcontractor to do the same.
c. The inspection or evaluation should **not** unduly delay the work.

Flow Down

Required.

Special Notes

1. The FPR counterpart to this clause, FPR 1-7.202-5, ''Inspection of Supplies and Correction of Defects'', is narrowly focused on circumstances which would arise in a very small number of research contracts, if at all. The provisions which are applicable to research contracts are the same as those of the ASPR clause analyzed here.

2. Inspection and evaluation by the Government does not relieve the Contractor from liability for unsatisfactory work under the contract.

INSPECTION AND REPORTS

Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To permit the Government to evaluate the contract work and inspect the premises where work is being performed, **so as to assure compliance with the contract.**

Comment

1. The Government has the right to make inspections of
   a. Work under the contract
   b. Activities under the contract
   c. **Any** premises where Government property is located.
2. The Contractor must
   a. Furnish progress reports
   b. Furnish schedules
   c. Furnish financial and cost reports
   d. Furnish any other reports specified in other clauses of the contract.
   e. Cooperate fully with any inspection.

Flow Down

Not required, **but** the Contractor should provide in the subcontract either that the Subcontractor must cooperate with the Government during its inspections or that the Subcontractor should notify the Contractor of such inspections and cooperate as directed by the Contractor.

Special Notes

1. Government inspection of any premises must be at **reasonable times.** This probably means that it must be made during normal working hours or other convenient times and **not** that notice needs to be given prior to inspection.
2. The Contractor's furnishing of cost and financial projections will **not** relieve him of the requirement of giving **specific** notice of cost overruns or shortages, as demanded by the ''Limitation of Cost'' clause.
3. **To whom** the Contractor must furnish his reports is to be specified in other parts of the contract — it is not specified here.

F-4 REPORTS OF WORK (1960 JUL)

(a) The Contractor shall submit reports making full disclosure of all work done and the results thereof, in the manner, at the times, and to the extent set forth in the Schedule; **provided** that, unless otherwise specified in the Schedule, the Contractor shall submit such reports in triplicate from time to time as requested and upon completion (or earlier termination) of the work. Except as may be otherwise specified in the Schedule, or unless the Contractor is otherwise instructed, the Contractor shall, upon completion (or earlier termination) of the work, deliver any working drawings and specifications of any prototypes as may have been developed.

(b) If the Contractor becomes unable to complete the contract work and to deliver at the time specified in the Schedule because of technical difficulties, notwithstanding the exercise of good faith and diligent efforts in performance of the work, he shall give the Contracting Officer written notice of the anticipated delays with reasons therefor not less than forty-five (45) days before the completion date specified in the Schedule or within such time as the Contracting Officer deems sufficient. When notice is so required, the Contracting Officer may in his discretion, extend the time specified in the Schedule for such period as he deems advisable.

Reference

ASPR 7-404.6 (1960 JUL)

Source of Clause

Regulation

Purpose of Clause

To provide the Government with periodic notice of the extent to which work under the contract has been completed, or will be delayed.

Comment

1. The Contractor must submit reports in triplicate, if not otherwise specified, disclosing fully the extent and results of work under the contract
   a. At the times and in the manner set forth in the schedule or task order **AND** (unless specified otherwise)
   b. From time to time as requested, **AND**
   c. Upon completion or termination of the work.
2. Upon completion or termination of the work under the contract, the Contractor must deliver,
   a. Any working drawings
   b. Any specifications of prototypes unless specified or instructed otherwise.
3. If the Contractor becomes unable to finish and deliver the contract work (notwithstanding good faith and diligent efforts) at the time specified in the schedule or task order, he must give the Contracting Officer **written** notice of the anticipated delays, with the reason for such,
   a. Not less than 45 days before the specified completion date
   b. Or within such time as the Contracting Officer deems sufficient (he may, for example, extend or shorten the required prenotification time).

Flow Down

Not required. However, the Contractor may want to include a similar clause in his subcontracts so that he receives similar reports.

Special Notes

None.

SECTION G
PUBLICITY

G-1 ACKNOWLEDGMENT OF SPONSORSHIP

(a) The Contractor agrees that in the release of information relating to this contract such release shall include a statement to the effect that the project or effort depicted was or is sponsored by the agency set forth in the schedule of this contract.

(b) For the purpose of this clause, ''information'' includes but is not limited to, news releases, articles, manuscripts, brochures, advertisements, still and motion pictures, speeches, trade association meetings, symposia, etc.

(c) Nothing in the foregoing shall affect compliance with the requirements of the clause of this contract entitled ''Military Security Requirements.''

(d) The Contractor further agrees to include this provision in any subcontract awarded as a result of this contract.

G-2 PUBLICATION AND PUBLICITY

(a) Unless otherwise specified in this contract, the Contractor is encouraged to publish and make available through accepted channels the results of its work under this contract. A copy of each article submitted by the Contractor for publication shall be promptly sent to the Project Officer. The Contractor shall also inform the Project Officer when the article or other work is published and furnish a copy of it as finally published.

(b) The Contractor shall acknowledge the support of the Department of Health, Education, and Welfare whenever publicizing the work under this contract in any media. To effectuate the foregoing, the Contractor shall include in any publication resulting from work performed under this contract an acknowledgement substantially as follows: ''The work upon which this publication is based was performed pursuant to Contract (insert number) with the (insert name of constituent agency), Department of Health, Education, and Welfare.''

ACKNOWLEDGEMENT OF SPONSORSHIP

G-1

Reference

Air Force, ASPR Sup (1970 JAN)

Source of Clause

Regulation

Purpose of Clause

To provide for acknowledgement of Government sponsorship whenever work under the contract is publicized.

Comment

1. The Contractor must acknowledge the sponsoring Government agency whenever it releases information relating to the contract.
   a. ''Information'' includes
      i. news releases, brochures, and advertisements
      ii. articles and manuscripts
      iii. still and motion pictures
      iv. speeches, trade association meetings and symposia
      v. and other things of a similar nature.
   b. Although no clear distinction is spelled out, it would seem that information is **not** ''released'' if it is discussed informally, or if a manuscript is circulated for comment among a small number of people.
2. This clause does **not** change the duty which the Contractor has regarding ''classified'' information. It must still comply with the ''Military Security Requirements'' clause, when such is applicable.

Flow Down

Required.

Special Notes

None.

PUBLICATION AND PUBLICITY

G-2

Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To provide the Government with copies of written work developed under a Government contract by requiring the Contractor to submit copies thereof. To provide due acknowledgement of the Government's role in bringing the publication into existence.

Comment

1. The Contractor is encouraged to publish and make available the results of work under the contract, provided no agreement states otherwise.
2. Whenever the Contractor seeks to publish a work, he is required to
   a. Submit a copy to the Project Officer prior to publication; and

b. Furnish the Project Officer a copy of it in its final form after publication.

3. The Contractor must acknowledge the Department of Health, Education and Welfare whenever his contract work is **publicized.** In addition, when the work is **published** an acknowledgement must be included: ''The work upon which this publication is based was performed pursuant to Contract (Insert number) with (insert name of constituent agency), Department of Health, Education and Welfare.''

Flow Down

Not required.

Special Notes

None.

SECTION H
SUBCONTRACTING

H-1 COMPETITION IN SUBCONTRACTING

FPR 1-7.202-30

The Contractor shall select Subcontractors (including suppliers) on a competitive basis to the maximum practicable extent consistent with the objectives and requirements of the contract.

H-2 LABOR SURPLUS AREA SUBCONTRACTING PROGRAM (1970 JUN)

(a) The Contractor agrees to establish and conduct a program which will encourage labor surplus area concerns to compete for subcontracts within their capabilities. In this connection, the Contractor shall —

(1) Designate a liaison officer who will (i) maintain liaison with duly authorized representatives of the Government on labor surplus area matters, (ii) supervise compliance with the ‘‘Utilization of Labor Surplus Area Concerns’’ clause, and (iii administer the Contractor's Labor Surplus Area Subcontracting Program;

(2) Provide adequate and timely consideration of the potentialities of labor surplus area concerns in all ‘‘make-or-buy’’ decisions

(3) Assure that labor surplus area concerns will have an equitable opportunity to compete for subcontracts, particularly by arranging soicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the particpation of labor surplus area concerns;

(4) Maintain records showing procedures which have been adopted to comply with the policies set forth in this clause; and

(5) Include the ‘Utilization of Labor Surplus Area Concerns’’ clause in subcontracts which offer substantial labor surplus area subcontacting opportunities.

(b) For subcontracting purposes, a ‘‘labor surplus area concern’’ is a concern that (1) has been certified by the Secretary of Labor (hereafter referred to as a certified concern) regarding the employment of a proportionate number of disadvantaged individuals and has agreed to perform substantially in or near sections of concentrated unemployment or underemployment, in persistent or substantial labor surplus areas, or in other areas of the United States; or (2) is not a certified concern but has agreed to perform substantially in persistent or substantial labor surplus areas. A certified concern shall be deemed to perform a substantial proportion of a contract in or near sections of concentrated unemployment or underemployment, in persistent or substantial labor surplus areas, or in other areas of the United States if the costs that the concern will incur on account of manufacturing or production in or near such sections or in

COMPETITION IN SUBCONTRACTING

H-1

References

ASPR 7-402.29, incorporates 7-104.40 (1962 APR)
FPR 1-7.202-30

Source of Clause

Regulation

Purpose of Clause

To require competitive subcontract selection so as to minimize total prime contract costs, but not to the extent that such selection interferes with the caliber of contract performance.

Comment

1. The Contractor must select Subcontractors and supplies on a competitive basis to the maximum practical extent possible without unduly compromising the objectives and requirements of the contract.
2. Presumably the guiding factor that the Contractor should consider in selecting Subcontractors or suppliers is price, but price alone should not be decisive. The Contractor may also consider other important factors such as past dealings with Subcontractors or their reputation for timely and high quality work. Or it may consider the quality of suppliers' products and what ancillary services are rendered with purchase, if any. In any event, the competitive basis utilized should be chosen for its value to the Contractor in accomplishing the objectives and meeting the requirements of the contract.

Flow Down

Not required.

Special Notes

1. The Contractor should document his efforts to comply with this clause by keeping records of bids, negotiations, inquiries, factors in decisions, etc.
2. Under ASPR, this clause is required for negotiated contracts of over $10,000.
3. Under the FPR, this clause is required in **all** cost-reimbursement supply contracts.

LABOR SURPLUS AREA SUBCONTRACTING PROGRAM

H-2

References

ASPR 7-402.27 incorporates 7-104.20 (1970 JUN) in accordance with 1-805.3(b)
FPR 1-7.203-19 incorporates 1-1.805-3(b)

Source of Clause

Regulation implementing Defense Manpower Policy #4 (Revised), 16 October 1967 (32A CFR Chapter 1) and U.S. Department of Labor Regulations, 29 CFR Part 8.

Purpose of Clause

To require the Contractor to arrange his subcontracting procedures so as to give ''Labor Surplus Area Concerns'' a fair chance to be selected as Subcontractors.

Comment

1. **Applicability and Administration**
   a. This **clause is required** in contracts
      i. which may exceed $500,000
      ii. which contain the ''Utilization of Labor Surplus Area Concerns'' clause, **AND**

H-2 such areas amount to more than 25% of the price of such contracts; a concern shall be deemed to perform a substantial proportion of a contract in a persistent or substantial labor surplus area if the costs that the concern will incur on account of manufacturing or production in such areas amount to more than 50% of the price of such contract.

(c) The Contractor further agrees, with respect to any subcontract hereunder which is in excess of $500,000 and which contains the clause entitled ''Utilization of Labor Surplus Area Concerns'' that he will insert provisions in the subcontract which will conform substantially to the language of this clause, including this paragraph (c), and that he will furnish the names of such Subcontractors to the Contracting Officer.

   - iii. which, in the opinion of the purchasing agency, offer substantial subcontracting possibilities
- b. **The Contractor must** appoint a ''liaison officer'' to
   - i. maintain contact with the Government on labor surplus area matters
   - ii. supervise compliance with the ''Utilization of Labor Surplus Area Concerns'' clause
   - iii. administer the labor surplus area subcontracting program.

2. **Labor Surplus Area Concerns**
   - a. A **labor surplus area** is a geographic area which, at the time of the award of the contract, is
      - i. **classified** by the Department of Labor as
         - a. a ''**section** of concentrated unemployment or underemployment''
         - b. an ''**area** of persistent unemployment''
         - c. an ''**area** of substantial unemployment''
      - ii. **individually certified** by the appropriate state employment security agency or the Department of Labor (**at the request** of a prospective Contractor) as an area of persistent or substantial unemployment.
   - b. **Labor Surplus Area Concern**

     There are three types of such concerns:
      - i. **A certified-eligible surplus labor area concern with a first preference**
         - a. is located
            - 1. **in or near a section** of concentrated unemployment or underemployment **OR**
            - 2. **in an area** of persistent or substantial unemployment.
         - b. **agrees to hire** disadvantaged individuals from such **sections** or **areas** for at least 25% of its new job openings under a plan certified by the Department of Labor.
         - c. **will perform,** or have its immediate certified first preference Subcontractor(s) perform, manufacturing or production work amount to at least 25% of the total contract costs **in or near such sections** or **in such areas.**
      - ii. **A certified-eligible surplus labor area concern with a second preference**
         - a. **is located** in any area of the U.S.
         - b. **agrees** to hire disadvantaged individuals for at least 15% of its new job openings under a plan certified by the Department of Labor.
         - c. **will perform,** or have its immediate certified first or second preference Subcontractor perform manufacturing or production work amounting to at least 25% of the total contract costs.
      - iii. **A persistent or substantial labor surplus area concern** is a concern which agrees that it and its immediate Subcontractors will perform work amounting to at least 50% of the contract costs in areas of persistent or substantial unemployment.

3. **Labor Surplus Area Subcontracting Program: The Contractor's Duties**
   - a. The **Contractor must arrange procedures,** quantities, specifications, delivery schedules, decisions to ''make or buy'' items for the contract, etc. in order to aid consideration of labor surplus area concerns as Subcontractors.
   - b. The **Contractor must maintain records** showing steps taken to comply with the policies of this clause.

Flow Down

Required.

1. The Contractor agrees to insert the ''Utilization of Labor Surplus Area Concerns'' clause in subcontracts which offer substantial labor surplus area subcontracting possibilities.
2. In addition, if such a subcontract exceeds $500,000, the Contractor agrees to insert the substance of this clause.

Special Notes

1. Because the functions of a Contractor's liaison officer under the Small Business, Labor Surplus Area, and Minority Business Enterprises Subcontracting Programs are essentially the same, the Contractor, unless required otherwise, may find it advantageous to have one person fulfill all three roles.
2. The ASPR clause refers to a labor surplus area concern certified by the Department of Labor as a ''certified concern'' while the FPR refers to it as a ''certified-eligible concern''; both mean the same thing.

H-3 MINORITY BUSINESS ENTERPRISES SUBCONTRACTING PROGRAM (1971 NOV)

(a) The Contractor agrees to establish and conduct a program which will enable minority business enterprises (as defined in the clause, entitled, ''Utilization of Minority Business Enterprises'') to be considered fairly as Subcontractors and suppliers under this contract. In this connection, the Contractor shall:

(1) Designate a liaison officer who will administer the Contractor's ''Minority Business Enterprises Program.''

(2) Provide adequate and timely consideration of the potentialities of known minority business enterprises in all ''make-or-buy'' decisions.

(3) Assure that known minority business enterprises will have an equitable opportunity to compete for subcontracts, particularly by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of minority business enterprises.

(4) Maintain records showing (i) procedures which have been adopted to comply with the policies set forth in this clause, including the establishment of a source list of minority business enterprises, (ii) awards to minority business enterprises on the source list, and (iii) specific efforts to identify and award contracts to minority business enterprises.

(5) Include the ''Utilization of Minority Business Enterprises'' clause in subcontracts which offer substantial minority business enterprise subcontracting opportunities.

(6) Cooperate with the Contracting Officer in any studies and surveys of the Contractor's minority business enterprises procedures and practices that the Contracting Officer may from time to time conduct.

(7) Submit periodic reports of subcontracting to known minority business enterprises with respect to the records referred to in subparagraph (4) above, in such form and manner and at such time (not more often than quarterly) as the Contracting Officer may prescribe.

(b) The Contractor further agrees to insert, in any subcontract hereunder which may exceed $500,000 provisions which shall conform substantially to the language of this clause, including this paragraph (b), and to notify the Contracting Officer of the names of such Subcontractors.

MINORITY BUSINESS ENTERPRISES SUBCONTRACTING PROGRAM

References

ASPR 7-402.33 incorporates 7-104.36(b) (1971 NOV)
FPR 1-7.203-20 incorporates 1-1.1310-2(b)

Source of Clause

Regulation authorized by Executive Order 11625

Purpose of Clause

To increase the involvement of minority business enterprises in Federal Procurement Programs by providing them the maximum practicable opportunity to perform Government contracts.

Comment

IF

1. a contract
    a. Exceeds $500,000,
    b. Is to be performed in the United States, its possessions or Puerto Rico (except for personal service contracts), and
    c. Offers substantial subcontracting possibilities

THEN

2. the Contractor must agree to set up a program to let minority business enterprises have a fair chance to be Subcontractors and suppliers under his contract. He must:
    a. Designate someone to run his ''minority business enterprises program.''
    b. Give known minority business enterprises adequate and timely consideration in his ''make-or-buy'' decisions.
    c. Arrange subcontracting competition so as to give known minority business enterprises a fair chance to compete.
    d. Maintain records showing
        i. Procedures used to comply with the policy of clause including establishing a list of potential minority Subcontractors.
        ii. The subcontracts given to minority business enterprises.
        iii. Specific efforts to award subcontracts to minority business enterprises.
    e. Include the ''Utilization of Minority Business Enterprises'' clause in subcontracts which offer subcontracting opportunities
    f. Cooperate with the Contracting Officer's studies and surveys of his minority business enterprises program.
    g. Submit periodic reports of his subcontracting to known minority business enterprises, as the Contracting Officer may prescribe.
    h. Include the ''Minority Business Enterprises Subcontracting Program'' clause in any of his subcontracts exceeding $500,000 and provide that the Subcontractor do likewise. The Contracting Officer shall be notified of the names of such Subcontractors.

Flow Down

Required, at all tiers

Special Notes

If a contract for less than $500,000 has substantial subcontract possibilities, the Contracting Officer shall urge — but cannot require — the Contractor to accept the ''Minority Business Enterprises Subcontracting Program'' clause.

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H-4 SMALL BUSINESS SUBCONTRACTING PROGRAM (1965 JUN)

(a) The Contractor agrees to establish and conduct a small business subcontracting program which will enable small business concerns to be considered fairly as Subcontractors and suppliers under this contract. In this connection, the Contractor shall—

(1) Designate a liaison officer who will (i) maintain liaison with the Government on small business matters, (ii) supervise compliance with the ''Utilization of Small Business Concerns'' clause, and (iii) administer the Contractor's ''Small Business Subcontracting Program.''

(2) Provide adequate and timely consideration of the potentialities of small business concerns in all ''make-or-buy'' decisions.

(3) Assure that small business concerns will have an equitable opportunity to compete for subcontracts, particularly by arranging solicitations, time for preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of small business concerns. Where the Contractor's lists of potential small business Subcontrator's are excessively long, reasonable effort shall be made to give all such business concerns an opportunity to compete over a period of time.

(4) Maintain records showing (i) whether each prospective Subcontractor is a small business concern, (ii) procedures which have been adopted to comply with the policies set forth in this clause, and (iii) with respect to the letting of any subcontract (including purchase orders) exceeding $10,000, information substantially as follows:

(A) Whether the award went to large or small business.

(B) Whether less than three or more than two small business concerns were solicited.

(C) The reason for non-solicitation of small business if such was the case.

(D) The reason for small business failure to receive the award if such was the case when small business was solicited.

The records maintained in accordance with (iii) above may be in such form as the individual Contractor may determine, and the information shall be summarized quarterly and submitted by the purchasing department of each individual plant or division to the Contractor's cognizant small business liaison officer. Such quarterly summaries will be considered to be management records only and need not be submitted routinely to the Government, however; records maintained pursuant to this clause will be kept available for review.

(5) Notify the Contracting Officer before soliciting bids or quotations on any subcontract (including purchase orders) in excess of $10,000 if (i) no small business concern is to be solicited, and (ii) the Contracting Officer's consent to the subcontract (or ratification) is required by a ''Subcontracts'' clause in this contract. Such notice will state the Contractor's reasons for non-solicitation of small business concerns, and will be given as early in the procurement cycle as possible so that the Contracting Officer may give the Small Business Administration timely notice to permit SBA a reasonable period to suggest potentially qualified small business concerns through the Contracting Officer. In no case will the procurement action be held up when to do so would, in the Contractor's judgment, delay performance under the contract.

(6) Include the ''Utilization of Small Business Concerns'' clause in subcontracts which offer substantial small business subcontracting opportunities.

(7) Cooperate with the Contracting Officer in any studies and surveys of the Contractor's subcontracting procedures and practices that the Contracting Officer may from time to time conduct.

(8) Submit DD Form 1140-1 each quarter in accordance with instructions provided on the form, except that where the Contractor elects to report on a corporate rather than a plant basis, he may submit his reports to the Military Department having the responsibility for the Small Business Subcontracting Program at the corporate headquarters. The reporting requirements of this subparagraph (8) do not apply to Small Business Contractors, Small Business Subcontractors, or educational and nonprofit institutions.

(b) ''A small business concern'' is a concern that meets the pertinent criteria established by the SBA and set forth in paragraph 1-701 of the Armed Services Procurement Regulation.

(c) The Contractor agrees that, in the event he fails to comply with his contractual obligations concerning the small business subcontracting program, this contract may be terminated, in whole or in part, for default.

(d) The Contractor further agrees to insert, in any subcontract hereunder which is in excess of $500,000 and which contains the ''Utilization of Small Business Concerns'' clause provisions which shall conform substantially to the language of this clause, including this paragraph (d), and to notify the Contracting Officer of the names of such Subcontractors; except that the Subcontractor will submit the DD Form 1140-1 reports to the Military Department having the responsibility for reviewing its Small Business Subcontracting Program (A Subcontractor may request advice from the nearest military purchasing or contract administration activity as to the Military Department to which he should submit his reports.)

SMALL BUSINESS SUBCONTRACTING PROGRAM

References

ASPR 7-402.9 incorporates 7-104.14(b) (1965 JUN) in accordance with 1-707.3(b)
FPR 1-7.203-18 incorporates 1-1.710-3(b)

Source of Clause

Regulation, as required by 15 USC §637(d).

Purpose of Clause

To require the Contactor to arrange his sucontracting procedures so as to give small business concerns a fair chance to be selected as Subcontractors or suppliers.

Comment

1. **Applicability and Administration**
   - a. This clause is required in contracts exceeding $500,000 which, in the opinion of the Contracting Officer, offer substantial subcontracting possibilities.
   - b. The Contractor
     - i. **will appoint** a ''liaison officer'' to
       - a. maintain liaison with the Government on small business matters
       - b. supervise compliance with the ''Utilization of Small Business Concerns'' clause
       - c. administer the small business subcontracting program
     - ii. **will cooperate** with studies by the Contracting Officer of its subcontracting methods
2. **The Small Business Subcontracting Program**
   - a. **A small business concern** (generally)
     - i. is independently owned and operated
     - ii. is not dominant in the field of operation in which it is bidding
     - iii. employs (with its affiliates)
       - a. less than 500 people, **OR**
       - b. less than any applicable Small Business Administration employee size standard (See 13 CFR §§121.3-8; 121.3-12: ASPR 1-701.1(a)(3): FPR 1-1.701-4.
   - b. **The Contractor's duties**
     - i. The Contractor shall **arrange procedures,** quantities, specifications, delivery schedules, decisions to ''make or buy'' items for the contract etc. in order to aid consideration of small business concerns as Subcontractors
     - ii. In order to alow the Small Business Administration to suggest possible small business Subcontractors, the Contractor will **notify the Contracting Officer early** in the procurement cycle, and **before** soliciting bids or quotations **IF**
       - a. a subcontract
         - 1. is for more than $10,000
         - 2. require Contracting Officer approval (see ''Subcontracts'' clause) **AND**
       - b. no small business is solicited.

     No procurement will be delayed, however, if the Contractor believes that doing so would delay performance of the contract.
     - iii. The Contractor **must maintain records** of
       - a. steps taken to implement the policies of this clause
       - b. whether prospective Subcontractors are small business concerns
     - iv. For **subcontracts exceeding $10,000,** the Contractor must
       - a. **maintain records** showing
         - 1. how many small business concerns were solicited (or why none were)
         - 2. whether the subcontract was awarded to large or small businesses, **AND**
         - 3. the reasons that solicited small businesses did not get the subcontract

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H-5 SUBCONTRACTING

(a) **Prior approval required.** Except as provided in (c) below, the Contractor shall not enter into any subcontract or purchase order not otherwise expressly authorized elsewhere in this contract without the prior written approval of the Contracting Officer and subject to such conditions as the Contracting Officer may require.

(b) **Request for approval.** The Contractor's request for approval to enter into a subcontract pursuant to this clause shall include:

(1) A description of the supplies or services to be called for by the subcontract;

(2) Identification of the proposed subcontractor and an explanation of why and how the proposed Subcontractor was selected, including the degree of competition obtained;

(3) The proposed subcontract price, together with the Contractor's cost or price analysis thereof;

(4) Identification of the type of subcontract to be used;

(5) A copy or draft of the proposed subcontract, if available; and

(6) Any other information which the Contracting Officer may require.

(c) **Certain purchases of property and services.** Prior written approval shall not be required for firm fixed-price subcontracts for the purchase or rental of any item of permanent research equipment having an acquisition cost of less than $1,000 or for the purchase or rental of any other item of personal property having a unit acquisition cost of less than $200 or an expected service life or less than 1 year, or for other firm fixed-price subcontracts in a total amount less than $1,000, unless otherwise specified elsewhere in this contract.

(d) **Contractor's procurement system.** The Contractor shall use methods, practices or procedures in subcontracting or purchasing (hereinafter referred to as the Contractor's ''procurement system'') acceptable to the Contracting Officer. The Contracting Officer may, at any time during the performance of this contract, require the Contractor to provide information concerning its procurement system.

(e) **Effect of subcontracting.** Subcontracts shall be made in the name of the Contractor and shall not bind nor purport to bind the Government. The making of subcontracts hereunder shall not relieve the Contractor of any requirement under this contract (including, but not limited to, the duty to properly supervise and coordinate the work of Subcontractors, and the duty to maintain and account for property pursuant to the clause of this contract entitled ''Government Property''). Approval of the provisions of any subcontract by the Contracting Officer shall not be construed to constitute a determination of the allowable of any cost under this contract, unless such approval specifically provides that it constitutes a determination of the allowability of such cost. In no event shall approval of any subcontract by the Contracting Officer be construed as effecting any increase in the estimated cost set forth in this contract. No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis.

b. **compile quarterly summaries** of the above records which the Contractor's ''liaison officer'' must keep available for government review H-4

3. **Enforcement**

The contract will be **terminated,** in whole or in part, **for default** if the Contractor fails to fulfill his duties under the clause.

Flow Down

Required

1. The Contractor agrees to insert the ''Utilization of Small Business Concerns'' clause in subcontracts which offer substantial subcontracting possibilities,
2. **In addition,** if such a subcontract exceeds $500,000, the Contractor agrees to insert the substance of this clause.

Special Notes

If the Contractor's list of possible small business Subcontractors is excessively long, he may rotate them in considering them for particular subcontracts.

SUBCONTRACTING H-5

Reference

HEW—315 (Rev. 12/72).

Source of Clause

Regulation.

Purpose of Clause

To control the amount and type of subcontract the Contractor may enter. To prevent the Contractor from using a subcontract to avoid the requirements of his contract.

Comment

1. The Contractor may **not** enter into any subcontract or purchase order unless,
   a. The contract expressly authorizes him to do so, **or**
   b. The Contracting Officer gives him prior written approval **and** the Contractor complies with any conditions required by the Contracting Officer.
2. The Contractor's request for the Contracting Officer's written approval to enter a subcontract must include,
   a. A description of the services or supplies to be subcontracted
   b. An identification of the proposed Subcontractor
   c. An explanation of why and how the proposed Subcontractor was selected, including an indication of how competitive the selection process was,
   d. The proposed subcontract price and the Contractor's cost or price analysis of it,
   e. An identification of the type of subcontract to be used (e.g. cost, cost-plus-fixed-fee, etc.)
   f. A copy of the proposed subcontract, if available,
   g. Any other information the Contracting Officer may require.
3. Among the approval conditions the Contracting Officer may establish are that:
   a. The Contractor uses a system of subcontracting or purchasing (''Procurement System'') which is acceptable to the Contracting Officer, and
   b. The Contractor furnishes information about his system of subcontracting or purchasing to the Contracting Officer when asked.
4. An approved subcontract:
   a. Shall be made in the name of the Contractor and not bind (or purport to) the Government.

H-5

H-6 In accordance with the requirements in ASPR 23-201.2, and subject to the instructions in (b) and (c) below, insert the following clause.

SUBCONTRACTS (1974 APR)

(a) The Contractor shall notify the Contracting Officer reasonably in advance of entering into any subcontract which (i) is cost-reimbursement type, time and materials, or labor-hour, or (ii) is fixed-price type and exceeds in dollar amount either $25,000 or five percent (5%) of the total estimated cost of this contract, (iii) provides for the fabrication, purchase, rental, installation, or other other acquisition of special test equipment having a value in excess of $1,000 or of any items of industrial facilities; or (iv) has experimental, developmental, or research work as one of its purposes.

(b) In the case of a proposed subcontract which (i) is cost-reimbursement, time and materials, or labor-hour which would involve an estimated amount in excess of $10,000, including any fee, (ii) is proposed to exceed $100,000, or (iii) is one of a number of subcontracts under this contract with a single Subcontractor for the same or related supplies or services which, in the aggregate are expected to exceed $100,000, the advance notification required by (a) above shall include:

(1) a description of the supplies or services to be called for by the subcontract;

(2) identification of the proposed Subcontractor and an explanation of why and how the proposed Subcontractor was selected, including the degree of competition obtained.

(3) the proposed subcontract price, together with the Contractor's cost or price analysis thereof;

(4) the Subcontractor's current, complete, and accurate cost or pricing data and Certificate of Current Cost or Pricing Data when such data and certificate are required by other provisions of this contract to be obtained from the Subcontractor;

(5) identification of the type of subcontract to be used;

(6) a memorandum of negotiation which sets forth the principal elements of the subcontract price negotiations. A copy of this memorandum shall be retained in the Contractor's file for the use of Government reviewing authorities. The memorandum shall be in sufficient detail to reflect the most significant considerations controlling the establishment of initial or revised prices. The memorandum should include an explanation of why cost or pricing data was, or was not required, and, if it was not required in the case of any price negotiation in excess of $100,000, a statement of the basis for determining that the price resulted from or was based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. If cost or pricing data was submitted and a certificate of cost or pricing data was required, the memorandum shall reflect the extent to which reliance was not placed upon the factual cost or pricing data submitted and the extent to which this data was not used by the Contractor in determining the total price objective and in negotiating the the final price. The memorandum shall also reflect the extent to which it was recognized in the negotiation that any cost or pricing data submitted by the Subcontractor was not accurate, complete, or current; the action taken by the Contractor and Subcontractor as a result; and the effect, if any, of such defective data

b. **Shall not relieve the Contractor from any of his requirements under the Contract.** In addition, the Contractor shall, H-5
   i. properly supervise and coordinate the work of the Subcontractors
   ii. maintain and account for property as he agreed to under the ''Government Property'' clause,

c. **Shall not,** in itself, determine allowability of any cost under the prime contract **unless** the Contracting Officer's approval **specifically** provides that such is the case.

d. Shall **never** effect any increase in the estimated cost established under the contract.

e. Shall never provide for payment on a cost-plus-a-percentage-of-cost basis.

Flow Down

Not required.

Special Notes

The Contractor **does not need prior** written approval in order to enter firm fixed-priced subcontracts for:

1. A purchase or rental of any permanent research equipment with a cost of less than $1,000, or
2. A purchase or rental of any other item of personal property with unit cost of less than $200 or an expected service life of less than 1 year, or
3. Any subcontracts in a total amount less than $1,000, unless otherwise specified in the contract.

SUBCONTRACTS

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References

ASPR 7-402.8 (1974 APR)
FPR 1-7.202-8

Source of Clause

Regulation as required by 10 U.S.C. §§2306(a),(e) (1970), and 41 U.S.C. §254(b) (1970).

Purpose of Clause

To establish Governmental control over the contents of subcontracts and to prevent favoritism in the award of contracts.

Comment

1. Notification and Approval

Prior to entering each subcontract the Contractor **must notify** the Contracting Officer of the subcontract and **obtain his written** approval or ratification of it. These requirements are **not applicable**

a. Under the **ASPR** to
   1. Subcontracts for the construction, purchase, rental, installation or other acquisition of **severable industrial facilities** having a value **not exceeding** $1,000 or (if lower) an amount specified in the schedule or task order.
   2. Subcontract for the construction, purchase, rental, installation or other acquisition of **special test equipment** having a value not exceeding of $1,000.
   3. **Other** contracts at a fixed-price which is less than $25,000 or 5% of the estimated cost of the contract.

b. Under the **FPR** to
   1. Subcontract for the fabrication, purchase, rental, installation or other acquisition of **special test equipment** having a value not exceeding of $1,000 or of any items of industrial facilities.
   2. **Other** subcontract at a fixed price which is less than $25,000 or 5% of the estimated cost of the contract.

on the total price negotiated. Where the total price negotiated differs significantly from the Contractor's total price objective, the memorandum shall explain this difference;

(7) when incentives are used, the memorandum of negotiation shall contain an explanation of the incentive fee/profit plan identifying each critical performance element, management decisions used to quantify each incentive element, reasons for incentives on particular performance characteristics, and a brief summary of trade-off possibilities considered as to cost, performance, and time; and

(8) the Subcontractor's Disclosure Statement or Certificate relating to Cost Accounting Standards when such data are required by other provisions of this contract to be obtained from the Subcontractor.

(c) The Contractor shall obtain the written consent of the Contracting Officer prior to placing any subcontract for which advance notification is required under (a) above. The Contracting Officer may, in his discretion, ratify in writing any such subcontract; such action shall constitute the consent of the Contracting Officer as required by this paragraph(c).

(d) The Contractor agrees that no subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis.

(e) The Contracting Officer may, in his discretion, specifically approve in writing any of the provisions of a subcontract. However, such approval or the consent of the Contracting Officer obtained as required by this clause shall not be construed to constitute a determination of the allowability of any cost under this contract, unless such approval specifically provides that it constitutes a determination of the allowability of such cost.

(f) The Contractor shall give the Contracting Officer immediate notice in writing of any action or suit filed, and prompt notice of any claim made against the Contractor by any Subcontractor or vendor which in the opinion of the Contractor, may result in litigation, related in any way to this contract, with respect to which the Contractor may be entitled to reimbursement from the Government.

(g) Notwithstanding (c) above, the Contractor may enter into subcontracts within (i) and (ii) of (a) above, without the consent of the Contracting Officer, if the Contracting Officer has approved in writing the Contractor's procurement system and the subcontract is within the scope of such approval. (This subparagraph (g) however, shall not be applicable to those subcontracts subject to subparagraph (j) below, if any.)

(h) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of the ''Limitation on Payments'' paragraph set forth in the appropriate clause prescribed by paragraph 7-108 of the Armed Services Procurement Regulations, including subparagraph (4) thereof, modified to omit mention of the Government and reflect the position of the Contractor as purchased and of the Subcontractor as vendor, and to omit that portion of subparagraph (3) thereof relating to tax credits, and (ii) include in each cost-reimbursement type subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of the ''Limitation on Payments'' provision, including subparagraph (4) thereof, modified as outlined in (i) above.

(i) To facilitate small business participation in subcontracting under this contract, the Contractor agrees to provide progress payments on the fixed-price types of subcontracts of those Subcontractors which are small business concerns, in conformity with the standards for customary progress payments stated in paragraphs 503 and 514 of Appendix E of the Armed Services Procurement Regulation, as in effect on the date of this contract. The Contractor further agrees that the need for such progress payments will not be considered as a handicap or adverse factor in the award of subcontracts.

(End of clause)

(b) Insert the following additional subparagraph to the clause in (a) above, in accordance with 23-201.2(d).

(j) Notwithstanding approval of the procurement system, the Contractor shall not enter into certain subcontracts or classes of subcontracts set forth elsewhere in this contract without the prior written consent of the Contracting Officer. (1967 APR)

(c) In contracts without fee with educational institutions, change ''(iii) in paragraph (a) of the clause in (a) above to read:

(iii) Provides for (A) the construction, purchase, rental, installation, or other acquisition of nonseverable industrial facilities, or (B) the fabrication, purchase, rental, installation, or other acquisition, of any item of either (1) severable industrial facilities having a value in excess of $1,000 or the amount, if any, specified in the Schedule or Task Order, whichever is the lesser, or (2) special test equipment having a value in excess of $1,000. (1967 APR)

In (iii)(B)(1) thereof, the $1,000 limit may, in the discretion of the Contracting Officer, be decreased where it is determined to be in the interest of the Government, in view of the circumstances of each particular contract, as, for example, the nature of the Contractor's operations, previous experience with the Contractor on comparable procurements, the Contractor's accounting and procurement systems, accounting and supply systems of the procurement activity, and the capability of the procuring activity to effect close surveillance of the Contractor's procurement and accounting practices. Also, in the discretion of the Contracting Officer, the cumulative total of acquisitions of severable industrial facilities may be limited

2. Detailed Notification

   IF

   a. A subcontract (or group of subcontracts with the same Contractor) exceeds $100,000 or
   b. A subcontract, **not at fixed prices,** has an estimated cost greater than $10,000

   THEN

   The Contractor 's notification to the Contracting Officer must

   a. Include the terms of the subcontract
   b. Justify the choice of the Subcontractor
   c. Provide a cost-analysis of the price
   d. Document in detail the negotiations which established the price
   e. Include any information required by other terms of the contract (e.g. see Cost Accounting Standards Clause).

3. Subcontracts may **not** be of the cost-plus-a-percentage of cost type.

4. Written consent to, approval of, or ratification of a subcontract or any provision of a subcontract by the Contracting Officer does not constitute a determination of the allowability of any cost **unless** it is specifically stated to be such a determination of allowability.

5. The Contractor **must** give **immediate written notice** to the Contracting Officer of any suit or action filed or claim made related to the contract by a Subcontractor which the Contractor thinks may result in litigation and for which the Contractor may be entitled to reimbursement from the Government.

6. The Contractor must agree to provide progress payments on fixed-price contracts with small business concerns in conformity with the applicable ASPR or FPR provisions cited in the clause and not to consider such requirements as an adverse factor in awarding subcontracts.

Flow Down

Not required.

1. Under **ASPR** each

   a. **Price redetermination** and **incentive price revision** subcontract entered into by the Contractor must contain the substance of the ''Limitation on Payments'' clause, substituting the Contractor for the Government and omitting the tax credit provision.
   b. **Cost-reimbursement subcontract** must require the Subcontractor to include the substance of the ''Limitation on Payments'' clause, as modified above, in all **lower tier** subcontracts providing for **price redetermination** and **incentive price revision.**

2. The Contractor is advised to include a prohibition against the use of cost-plus a pecentage of cost type contracts in all subcontracts.

Special Notes

1. Waiver of Advance Notice and Prior Approval Requirements

   IF

   the Contracting Officer has approved in writing the Contractor 's procurement system (purchasing and subcontracting system) and the subcontract is within the scope of that approval

   THEN

   the Contractor does not have to comply with the advance notice and approval requirements for subcontracts.

2. Under **ASPR** even though the Procurement System has been approved by the Contracting Officer, the clause may include a provision that certain subcontracts or classes of subcontracts set forth in the contract will always require prior written approval by the Contracting Officer.

H-6 to a stated dollar amount or an amount equal to a stated percentage of the estimated cost, beyond which amount the Contractor will be required to obtain written consent of the Contracting Officer for any additional acquisitions of such facilities.

H-7 UTILIZATION OF LABOR SURPLUS AREA CONCERNS (1970 JUN)

(a) It is the policy of the Government to award contracts to labor surplus area concerns, that (1) have been certified by the Secretary of Labor (hereafter referred to respectively as certified concerns with a first or second preference) regarding the employment of a proportionate number of disadvantaged individuals and have agreed to perform substantially (i) in or near sections of concentrated unemployment or underemployment or in persistent or substantial labor surplus areas or (ii) in other areas of the United States; or (2) are noncertified concerns which have agreed to perform substantially in persistent or substantial labor surplus areas, where this can be done consistent with the efficient performance of the contract and at prices no higher than are obtainable elsewhere. The Contractor agrees to use his best efforts to place his subcontracts in accordance with this policy.

(b) In complying with paragraph (a) of this clause and with paragraph (b) of the clause of this contract entitled ''Utilization of Small Business Concerns,'' the Contractor in placing his subcontracts shall observe the following order of preference: (1) certified concerns with a first preference which are also small business concerns, (2) other certified concerns with a first preference, (3) certified concerns with a second preference which are also small business concerns, (4) other certified concerns with a second preference, (5) persistent or substantial labor surplus area concerns which are also small business concerns, (6) other persistent or substantial labor surplus area concerns, and (7) small business concerns which are not labor area concerns.

UTILIZATION OF LABOR SURPLUS AREA CONCERNS

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References

ASPR 7-402.27 incorporates 7-104.20 (1970 JUN) in accordance with 1-805.3(a)
FPR 1-7.202-27 incorporates 1-1.805-3(a)
HEW-315 (Rev 12/72)

Source of Clause

Regulation implementing Defense Manpower Policy No. 4 (revised), 16 October 1967 (32A CFR Chapter 1) and U.S. Department of Labor Regulations, 29 CFR Part 8.

Purpose of Clause

To alleviate regional unemployment or underemployment by establishing a subcontracting preference for labor surplus area concerns.

Comment

1. **Labor Surplus Area Concerns**
   - a. A **Labor Surplus Area** is a geographic area which, at the time of the award of the contract, is
     - i. **classified** by the Department of Labor as
       - a. a ''**section** of concentrated unemployment or underemployment''
       - b. an ''**area** of persistent unemployment''
       - c. an ''**area** of substantial unemployment.''
     - ii. **Individually certified** by the appropriate state employment security agency or the Department of Labor (**at the request** of a prospective contractor) as an area of persistent or substantial unemployment.
   - b. **Labor Surplus Area Concern**

     There are three types of such concerns:
     - i. **A certified-eligible surplus labor area concern with a first preference**
       - a. is located
         1. **in or near a section** of concentrated unemployment or underemployment **or**
         2. **in an area** of persistent or substantial unemployment
       - b. **agrees to hire** disadvantaged individuals from such **sections** or **areas** for at least 25% of its new job openings under a plan certified by the Department of Labor
       - c. **will perform,** or have its immediate certified first preference Subcontractor(s) perform manufacturing or production work amounting to at least 25% of the total contract costs **in or near such sections** or **in such areas.**
     - ii. **A certified-eligible surplus labor area concern with a second preference**
       - a. **is located** in any area of the U.S.
       - b. **agrees** to hire disadvantaged individuals for at least 15% of its new job openings under a plan certified by the Department of Labor
       - c. **will perform,** or have its immediate certified first or second preference Subcontractor perform manufacturing or production work amounting to at least 25% of the total contract costs.
     - iii. **A persistent or substantial labor surplus area concern** is a concern which agrees that it and its immediate Subcontractors will perform work amounting to at least 50% of the contract costs in areas of persistent or substantial unemployment.
2. **The Contractor's Duties**
   - a. **The Contractor agrees** to use his **best efforts** to place subcontracts with labor surplus area concerns, in the following order of preference:

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H-8 UTILIZATION OF MINORITY BUSINESS ENTERPRISES (1971 NOV)

(a) It is the policy of the Government that Minority Business Enterprises shall have the maximum practicable opportunity to participate in the performance of Government contracts.

(b) The Contractor agrees to use his best efforts to carry out this policy in the award of his subcontracts to the fullest extent consistent with the efficient performance of this contract. As used in this contract, the term ''minority business enterprise'' means a business, at least 50 percent of which is owned by minority group members or, in the case of publicly-owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of this definition, minority group members are Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American Eskimos, and American Aleuts. Contractors may rely on written representations by Subcontractors regarding their status as minority business enterprises in lieu of an independent investigation.

    i. Labor surplus area concerns that are certified as eligible by the Secretary of Labor, with a first preference. **H-7**
    ii. Labor surplus area concerns that are certified as eligible by the Secretary of Labor, with a second preference.
    iii. Persistent or substantial labor surplus area concerns.
    iv. Concerns other than labor surplus area concerns.

If two concerns fall within the same preference category, **then** the Contractor should choose a small business concern over a large one, so as to comply with the ''Utilization of Small Business Concerns'' clause (see that clause).

b. The **Contractor need not choose** any Subcontractor if
    i. it believes that to do so would be inconsistent with the efficient performance of the contract, or
    ii. such a choice would cause a higher subcontract price.

Flow Down

Not required. However, see the ''Flow Down'' section in the discussion of the ''Labor Surplus Area Subcontracting Program'' clause.

Special Notes

1. This clause is required in all contracts which may exceed $5,000 except (under the FRP and the ASPR).
    a. Contracts with foreign Contractors (and their subcontracts) when such are to be performed entirely outside of the United States, its possessions, Puerto Rico, and the trust territory of the Pacific Islands.
    b. Contracts for personal services.
    c. Construction contracts.
    d. Contracts with the petroleum and petroleum products industry (ASPR only).

UTILIZATION OF MINORITY BUSINESS ENTERPRISES **H-8**

References

ASPR 7-402.33 incorporates 7-104.36(a) (1971 NOV)
FPR 1-7.202-28 incorporates 1-1.1310-2(a)
HEW-315 (Rev. 12/72)

Source of Clause

Regulation authorized by Executive Order 11625

Purpose of Clause

To increase the involvement of minority business enterprises in Federal Procurement Programs by providing them the maximum practicable opportunity to perform Government contracts.

Comment

1. The Contractor agrees to use his best efforts to increase his subcontracts with minority business enterprises, to the extent that such is consistent with the efficient performance of his contract.
2. A ''Minority Business Enterprise''
    a. Is a business, at least 50% of which is owned by minority group members.
    b. A publicly-owned business, at least 51% of the stock of which is owned by minority group members.
3. ''Minority Group Members'' are
    a. Blacks
    b. Spanish-speaking Americans
    c. American-Orientals
    d. American Indians
    e. American Eskimos
    f. American Aleuts.

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H-9 UTILIZATION OF SMALL BUSINESS CONCERN (1958 JAN)

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

Flow Down

Not required. But see Comment 2e of the clause ''Minority Business Enterprises Subcontracting Program''

Special Notes

The Utilization of Minority Business Enterprises is required under ASPR and FPR only for contracts

a. exceeding $5,000
b. to be wholly or partially performed in the United States
c. not for personal services.

UTILIZATION OF SMALL BUSINESS CONCERNS

References

ASPR 7-402.9 incorporates 7-104.14(a) (1958 JAN)
FPR 7-202.26 incorporates 1-702.26 incorporates 1-710.3(a)
HEW-315 (Rev. 12/72)

Source of Clause

Regulation, expressing Congressional policy as declared in the Small Business Act of 1953, 15 U.S.C. §§631 to 647 (1970).

Purpose of Clause

To encourage the Contractor to use small business concerns as Subcontractors and suppliers.

Comment

1. **Small Business Subcontractor**

Generally, a Subcontractor on a research and development subcontract qualifies as a small business concern if

a. it is independently owned and operated, **AND**
b. it is not dominant in the field of operation in which it is bidding, **AND**
c. it (plus its affiliates) employs
  i. less than 500 people, **OR**
  ii. less than the employee size standard established by the Small Business Administration (applicable only for manufacturing Subcontractors in S.B.A. listed industries) see 13 CFR §§121.3-8, 121.3-12, ASPR 1-701.1(a)(3), FPR 1-1.701-4

2. **The Contractor's Agreement**

a. The Contractor agrees to try to use small business concerns as Subcontractors as much as possible, **all other things being equal**
b. The clause **does not require**
  1. that the Contractor favor small business concerns when that would be in any way **inconsistent with efficient performance.**
  2. that more than a fair proportion of purchases and subcontracts be placed with small business concerns.

Flow Down

Not required.

Special Notes

1. This clause is **not required** in contracts
  a. of $5,000 or less
  b. which are to be performed **entirely** outside of the United States, its possessions, and Puerto Rico, **OR**
  c. for personal services.
2. If a doubt arises as to whether or not a potential Subcontractor is a small business concern, the Contractor should request it to get a Small Business Administration certification of its status.

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SECTION I
EMPLOYMENT

I-1 CONTRACT WORK HOURS AND SAFETY STANDARDS ACT — OVERTIME COMPENSATION (1971 NOV)

This contract, to the extent that it is of a character specified in the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), is subject to the following provisions and to all other applicable provisions and exceptions of such Act and the regulations of the Secretary of Labor thereunder.

(a) **Overtime requirements** No Contractor or Subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he is employed on such work to work in excess of eight hours in any calendar day or excess of forty hours in such workweek on work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is the greater number of overtime hours.

(b) **Violation; liability for unpaid wages; liquidated damages.** In the event of any violation of the provisions of paragraph (a), the Contractor and any Subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such Contractor and Subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight hours or in excess of his standard workweek of forty hours without payment of the overtime wages required by paragraph (a).

(c) **Withholding for unpaid wages and liquidated damages.** The Contracting Officer may withhold from the Government Prime Contractor, from any moneys payable on account of work performed by the Contractor or Subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such Contractor or Subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) **Subcontracts.** The Contractor shall insert paragraphs (a) through (d) of this clause in all subcontracts, and shall require their inclusion in all subcontracts of any tier.

(e) **Records.** The Contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for three years from the completion of the contract.

CONTRACT WORKHOURS AND SAFETY STANDARDS ACT — OVERTIME COMPENSATION

References

ASPR 7-402.16 incorporates 7-103.16(a) (1971 NOV)
FPR 1-7.202-16 incorporates 1-12.303

Source of Clause

Regulation, as required by the Contract Work Hours and Safety Standards Act of 1962, 40 U.S.C. §§327-333 (1970), 76 Stat. §§357-360, 83 Stat. §§96-97.

Purpose of Clause

To establish standards for hours of work and overtime pay of laborers and mechanics employed on work done under contract with the Government.

Comment

1. **Overtime Requirements**

IF

a Government Contractor or Subcontractor **requires or permits** laborers and mechanics, including watchmen and guards, in its employ **to work in excess of**

a. a standard workday of eight (8) hours, or
b. a standard workweek of forty (40) hours,

THEN

the Contractor or Subcontractor is required to compensate its laborers and mechanics at a rate **not less than** one and one half (1½) times the basic rate of pay for **all hours in excess of,**

a. the standard workday, **OR**
b. the standard workweek,

whichever is the greater number of overtime hours.

2. **Liability for Violation**

Any failure of a Contractor or Subcontractor, during performance of the contract, to compensate its laborers and mechanics as required by this clause shall result in liability to:

a. the affected employee for his unpaid wages; and
b. the Government for liquidated damages in the sum of $10 for each calendar day in which a violation occurred

3. **Withholding of funds for unpaid wages and liquidated damages**

Payment to the Contractor for any work done under the contract or subcontract may be withheld by the Contracting Officer in such sums as he determines to be necessary to satisfy any liabilities of the Contractor **or** Subcontractor for unpaid wages and liquidated damages.

A Contractor or Subcontractor aggrieved by such action may appeal to the head of the administrative agency, provided it does so in the required time (60 days after the action is taken) and complies with the procedure set forth in the Act, 40 U.S.C. §§330(c). After having exhausted his administrative remedies, the Contractor or Subcontractor may file a claim in the Court of Claims if it does so within 60 days of a final order of the **Secretary of Labor.** However, a final order of the Secretary of Labor is final as to findings of fact unless such findings are not supported by substantial evidence.

4. **Computation of overtime and liquidated damages**

The methods used below to determine underpayments shall also be used to determine liquidated damages.

a. **Overtime incurred for workdays only**

When the hours worked by a laborer or mechanic during a single standard workweek or less exceed eight (8) on any day, the total number of hours in excess of each standard workday shall be used to

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calculate the overtime compensation due the employee.

b. **Overtime incurred for a workweek only**

When the hours worked during a single workweek exceed forty (40) but do not exceed eight hours in any thereof, the total number of hours in excess of the standard workweek shall be used to calculate the overtime compensation due the employee.

c. **Overtime incurred for both a workday and workweek.**

When the hours worked during a workweek exceed both the standard workday and workweek, the number of overtime hours in excess of the standard workday and workweek shall be computed separately and the method resulting in the greater number of hours shall be used to calculate the overtime compensation due the employee.

5. **Payroll Records**

The Contractor is required to maintain payroll records and to preserve them for **three (3) years** after completion of the contract. Briefly, these records shall include:

a. basic information that identifies the employee and indicates his occupation;

b. information that indicates the exact method by which the employee's pay is determined, e.g. his weekday and workweek hours and rate of pay;

c. specifications as to the amounts actually paid, including overtime compensation, and the period for which payment is made.

See 29 C.F.R. §516(a) for a detailed description.

— Additional Provisions of the Act —

6. **Limitations, variations, tolerances and exemptions.**

The Secretary of Labor, with regard to contracts subject to the Act, may set reasonable limitations, and make such rules and regulations allowing reasonable variations, tolerances and exemptions from any provisions of the Act that he may find to be in the public interest to prevent injustice or undue hardship or to avoid serious impairment of Government business. 40 U.S.C. §331. (See also Reorganization Plan Number 14 of 1950 (Special Notes 1 and 4)).

7. **Health and Safety Standards for Construction work.**

IF

a. the contract requires construction work which,

   i. is so closely related to research, experiment and development that it cannot be performed separately, or which itself is the subject of research, experiment or development, and,

   ii. the construction work exceeds $2,500 in the aggregate.

THEN

no Contractor or Subcontractor shall require any laborer or mechanic employed under the contract to work in surroundings or under conditions that are unsanitary, hazardous or dangerous to his health and safety, as determined under construction and safety standards established by the Secretary of Labor (See 29 C.F.R. §1926) and 40 U.S.C. §333(a)).

b. The Secretary of Labor is authorized to implement and enforce the provisions of this section. 40 U.S.C. §333(b).

Flow Down

Required at all tiers.

Special Notes

1. This clause does **not** apply to the following:

   a. contracts for transportation by land, water or air, or for the transmission of intelligence, or for the purchase of supplies or materials ordinarily available in the open market or contracts subject to the Walsh-Healey Public Contracts Act. 40 U.S.C. §329(b);

   b. contracts of $2,000 or less, 29 C.F.R. §514(b)(3);

   c. purchases and contracts other than construction contracts for $2,500 or less. 29 C.F.R. §514(b)(4);

   d. contracts to be performed in foreign countries and certain U.S. territories to the extent that such contracts involve the employment of mechanics or laborers there, 29 C.F.R. §514(b)(5), or

   e. any other contracts that the Secretary of Labor, pursuant to Section 331 or the Act (and Reorganization Plan No. 14 of 1950) may exempt in order to prevent injustice, undue hardship or serious impairment of Government business.

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I-2 CONTRACT WORK HOURS STANDARDS ACT — OVERTIME COMPENSATION

This contract, to the extent that it is of a character specified in the Contract Work Hours Standards Act (40 U.S.C. 327-330), is subject to the following provisions and to all other applicable provisions and exceptions of such Act and the regulations of the Secretary of Labor thereunder.

(a) **Overtime requirements.** No Contractor or Subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek on work subject to the provisions of the Contract Work Hours Standards Act unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is the greater number of overtime hours.

(b) **Violation; liability for unpaid wages; liquidated damages.** In the event of any violation of the provisions of paragraph (a), the Contractor and any Subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by paragraph (a).

(c) **Withholding for unpaid wages and liquidated damages.** The Contracting Officer may withhold from the Government Prime Contractor, from any moneys payable on account of work performed by the Contractor or Subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such Contractor or Subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) **Subcontracts.** The Contractor shall insert paragraphs (a) through (d) of this clause in all subcontracts, and shall require their inclusion in all subcontracts of any tier.

(e) **Records.** The Contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for three years from the completion of the contract.

2. If the sums withheld to satisfy **liabilities for unpaid wages** are insufficient to reimburse all laborers and mechanics for work under the contract, they have the rights of action and/or intervention against the Contractor and its sureties. Such rights cannot be waived even if the laborers and mechanics agreed to accept less than the required rate of overtime compensation or voluntarily made refunds, such conduct does not alter the Contractor's liability to them, 40 U.S.C. §330(b). I-1
3. The Comptroller General shall pay under-compensated laborers and mechanics, from the sums withheld, the amounts administratively determined to be due if the funds withheld are adequate, and, if not, an equitable proportion of such amounts, 40 U.S.C. §330(a).
4. Under the Reorganization Plan Number 14 of 1950, 5 U.S.C. §534, the Secretary of Labor is authorized to prescribe appropriate standards, regulations and procedures in order to implement and enforce the provision of the Contract Work Hours Standards Act.
5. **Any willful violation** of the Contract Work Hours Standard Act of 1962 may result in
   a. debarment of the Contractor or Subcontractor for a period not to exceed three (3) years, 29 C.F.R. §6(b)(1), and/or
   b. criminal prosecution for which a conviction is a misdemeanor, punishable by a fine not exceeding $1,000 or by imprisonment for no more than six (6) months, 40 U.S.C. §332.
6. FPR provision expressly includes apprentices, trainees and watchmen as protected workers under the clause. FPR 1-12.303(b). Inclusion of such workers is implied in ASPR.

CONTRACT WORK HOURS STANDARDS ACT — OVERTIME COMPENSATION I-2

Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation, as required by the Contract Work Hours Standards Act of 1962, 40 U.S.C. §§327-330 (1970), 76 Stat. §§357-359.

Purpose of Clause

To establish standards for hours of work and overtime pay for laborers and mechanics employed for work to be done under contract with the Government.

Comment

1. **Overtime Payment Requirements**

   IF

   A Contractor or a Subcontractor **requires** or **permits** laborers and mechanics (including watchmen and guards) working on a Government contract or subcontract **to work in excess of**

   a. A standard workday of eight (8) hours, **or**
   b. A standard workweek of forty (40) hours,

   THEN

   The Contractor or Subcontractor must compensate such laborers and mechanics at a rate **not less than** one and one-half (1½) times the basic rate of pay **for all hours in excess of**

   a. The standard workday, or
   b. The standard workweek

   whichever yields the greater number of overtime hours.

2. **Liability for Failure to Make Overtime Payments**

   Any failure by a Contractor or Subcontractor, during performance of a Government contract, to compensate its laborers and mechanics as required by this clause shall result in liability to:

   a. The affected employee for his or her unpaid wages, and
   b. The Government for liquidated damages in the sum of $10 for each affected employee, for each calendar day in which such failure occurred.

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3. **Withholding of Funds for Unpaid Wages and Liquidated Damages**

The Contracting Officer may withhold sums payable to the Contractor for any work done under the contract or subcontract when such a withholding is necessary to satisfy any liabilities of the Contractor or Subcontractor for

a. **Unpaid Wages**

These amounts will be held for the use and benefit of laborers and mechanics not paid as required by law.

b. **Liquidated Damages**

These amounts will be held for the use and benefit of the United States, District of Columbia, or U.S. Territory, depending on the place where the law was violated.

4. **Contractor's Appeal Concerning Liquidated Damages**

a. Administrative Appeal

A Contractor or Subcontractor aggrieved by the withholding of **liquidated damages** may appeal such withholding to the head of the administrative agency involved. Such an appeal must be made within 60 days of the withholding. The agency head

i. May issue a **final order** affirming the amount withheld, **or**

ii. May determine that
   a. The amount withheld was incorrect, or
   b. The Contractor or Subcontractor, although violating the law, was not negligent, **AND**

iii. Recommend to the Secretary of Labor that
   a. Adjustments in the amount of liquidated damages be made, or
   b. The Contractor or Subcontractor be released of liability for liquidated damages.

Here, the Secretary will make a **final order.**

b. Judicial Appeal

After having exhausted its administrative remedies, the Contractor or Subcontractor may file a claim in the Court of Claims, **if** it does so within 60 days of the final order issued by the Agency head or the Secretary of Labor. The final order will be final as to findings of fact, unless such findings are not supported by substantial evidence.

5. **Payroll Records — Maintenance and Preservation**

The Contractor is required to maintain payroll records and to preserve them for three (3) years after completion of the contract. Briefly, these records must include

a. Basic information that identifies the employee and indicates his or her occupation.
b. Information that indicates the exact method by which the employee's pay is determined, e.g., his weekday and workweek hours and rate of pay.
c. Specifications as to the amounts actually paid, including overtime compensation, and the period for which payment is made.

See 29 C.F.R. §516.2(a) for a more detailed description of the information required to be maintained and preserved.

Flow Down

Required at all tiers. (except that the requirement to maintain payroll records may be excluded).

Special Notes

1. This clause does **not** apply to the following:
   a. Contracts for transportation by land, water, or air, or for the transmission of intelligence, or for the purchase of supplies or materials ordinarily available in the open market.
   b. Contracts under which **all** work done is subject to the Walsh-Healey Public Contracts Act.
   c. Contracts of $2,000 or less.
   d. Purchases and contracts other than construction contracts for $2,500 or less.
   e. Contracts to be performed in foreign countries and certain U.S. Territories.
   f. Any other contract which the Secretary of Labor may exempt in order to prevent injustice, undue hardship, or serious impairment of Government business.
2. The Comptroller General is authorized to pay undercompensated laborers and mechanics, from the sums withheld from the Contractor, the amounts administratively determined to be due them. If the

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I-3 **CONVICT LABOR (1974 APR)**

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment except as provided by Public Law 89-176, September 10, 1965 (18 U.S.C. §4082 (c) (2)) and Executive Order 11755, December 29, 1973. (Sec. 205 (c)), 63 Stat. §390; 40 U.S.C. §486 (c)).

funds the Government withheld were inadequate to fully reimburse such laborers and mechanics, the amounts which were withheld will be distributed on a proportionate basis. I-2

3. If the sums withheld to satisfy liabilities on the Contractor or Subcontractor for **unpaid wages** are insufficient to reimburse all the laborers and mechanics for work under the contract, they have rights of action and/or intervention against the Contractor and its sureties. Furthermore, even if these laborers and mechanics have agreed to accept less than the required rate of overtime compensation or voluntarily made refunds, their agreement **does not waive** the Contractor's full liability to them for the required wages.
4. Under the Reorganization Plan for Labor Standards Enforcement (Reorganization Plan Number 14 of 1950), the Secretary of Labor is authorized to prescribe appropriate standards, regulations, and procedures with respect to Government Contractors and Subcontractors.
5. **Any willful violation** of the Contract Work Hours Standards Act of 1962 may result in:
   a. Debarment of the Contractor or Subcontractor for a period not to exceed three (3) years and/or
   b. Criminal prosecution for a misdemeanor, punishable by a fine not exceeding $1,000 or by imprisonment for no more than six (6) months, or by both — **for each and every offense.**

CONVICT LABOR

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References

ASPR 7-402.14, incorporates 7-104.17 (1974 APR)
FPR 1-7.202.15, incorporates 1-12-204
HEW-315 (Rev. 12/72)

Source of Clause

Regulation, as required by 18 U.S.C. §436 and in accordance with Executive Order 325A, May 18, 1905.

Purpose of Clause

To prohibit the employment by Government Contractors of persons under sentences of imprisonment at hard labor.

Comment

1. This is a required clause in all Government contracts, and by its insertion, the Contractor agrees not to employ any person serving a sentence of imprisonment at hard labor imposed by any criminal court.
2. The prohibition above does not apply to the employment of
   a. Persons on parole or probation; or
   b. Federal prisoners authorized to work by the Attorney General, pursuant to 18 U.S.C. §4082 (c) (2), at paid employment; or
   c. Persons who have been pardoned or who have served their terms.
3. The following types of contracts are excluded from the prohibition against convict labor.
   a. Contracts subject to the Walsh-Healey Public Contract Act, which contains its own provisions relating to the use of convict labor;
   b. Contracts for the purchase of supplies or service from Federal Prison Industries Inc.; or
   c. Contracts with state prisons for the purchase of finished goods which may be purchased in the open market.

Flow Down

Not required.

Special Notes

None.

I-4 EMPLOYMENT OF THE HANDICAPPED

(This clause applies to all nonexempt contracts and subcontracts which exceed $2,500 as follows: (1) Part A applies to contracts and subcontracts which provide for performance in less than 90 days, (2) Parts A and B apply to contracts and subcontracts which provide for performance in 90 days or more and the amount of the contract or subcontract is less than $500,000, and (3) Parts A, B, and C apply to contracts and subcontracts which provide for performance in 90 days or more and the amount of the contract or subcontract is $500,000 or more.)

Part A

(a) The Contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The Contractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The Contractor agrees that, if a handicapped individual files a complaint with the Contractor that he is not complying with the requirements of the Act, he will (1) investigate the complaint and take appropriate action consistent with the requirements of 20 CFR 741.29 and (2) maintain on file for 3 years, the record regarding the complaint and the actions taken.

(c) The Contractor agrees that, if a handicapped individual files a complaint with the Department of Labor that he has not complied with the requirements of the Act, (1) he will cooperate with the Department in its investigation of the complaint, and (2) he will provide all pertinent information regarding his employment practices with respect to the handicapped.

(d) The Contractor agrees to comply with the rules and regulations of the Secretary of Labor in 20 CFR, Ch VI, Part 741.

(e) In the event of the Contractor's noncompliance with the requirements of this clause, the contract may be terminated or suspended in whole or in part.

(f) This clause shall be included in all subcontracts over $2,500.

Part B

(g) The Contractor agrees (1) to establish an affirmative action program, including appropriate procedures consistent with the guidelines and the rules of the Secretary of Labor, which will provide the affirmative action regarding the employment and advancement of the handicapped required by Public Law 93-112, (2) to publish the program in his employee's or personnel handbook or otherwise distribute a copy to all personnel, (3) to review his program on or before March 31 of each year and to make such changes as may be appropriate, and (4) to designate one of his principal officials to be responsible for the establishment and operation of the program.

(h) The Contractor agrees to permit the examination by appropriate contracting agency officials or the Assistant Secretary for Employment Standards or his designee, of pertinent books, documents, papers, and records concerning his employment and advancement of the handicapped.

(i) The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Assistant Secretary for Employment Standards, provided by the Contracting Officer stating the Contractor's obligation under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment and the rights and remedies available.

(j) The Contractor will notify each labor union or representative of workers with which he has a collective bargaining agreement or other contract understanding, that the Contractor is bound by the terms of section 503 of the Rehabilitation Act, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

Part C

(k) The Contractor agrees to submit a copy of his affirmative action program to the Assistant Secretary for Employment Standards within 90 days after the award to him of a contract or subcontract.

(l) The Contractor agrees to submit a summary report to the Assistant Secretary for Employment Standards by March 31 of each year during performance of the contract, and by March 31 of the year following completion of the contract, in the form prescribed by the Assistant Secretary, covering employment and complaint experience, accommodations made, and all steps taken to effectuate and carry out the commitments set forth in the affirmative action program.

EMPLOYMENT OF THE HANDICAPPED

Reference

FPR 1-7.202-37 incorporates 1-12.1304-1.

Source of Clause

Required by §503 of the Rehabilitation Act of 1973, P.L.93-112, Executive Order 11758, January 15, 1974, and regulations of the Department of Labor, 20 CFR 741, see also the Service Contract Act, 79 Stat. §1034, 86 Stat. §789, 31 U.S.C. §§351 et. seq.

Purpose of Clause

To promote employment of persons with mental or physical disabilities by Government Contractors and Subcontractors.

Comment

1. **"Handicapped Individual"**

   A ''handicapped'' individual is a person who has a mental or physical disability

   a. Which constitutes or results in a substantial barrier to employment, **and**

   b. Has reasonably benefitted in terms of employability from any of the types of vocational rehabilitation services provided under Titles I and III of the Rehabilitation Act of 1973 or their equivalent.

2. **Contractor's duties increase with the size of the Government Contract.** The clause establishes three classes of contracts with **cumulative requirements:** As the size of the contract increases so do the Contractor's duties. The progression of these duties is from

   a. The basic contractual duties to

   b. Basic duties plus affirmative action program to

   c. Basic duties, affirmative action program and reporting.

3. **Basic Contractual Duties**

   IF

   the contract

   a. Exceeds $2,500 and

   b. Provides for performance in less than 90 days

   THEN

   The Contractor agrees:

   a. Not to discriminate against any employee or applicant because of physical or mental handicap in regard to any position for which the person is qualified.

   b. To take **affirmative action** to

      i. Employ,

      ii. Advance in employment, and

      iii. Otherwise treat handicapped individuals **without discrimination based on their handicap** in all employment practices, including but not limited to

         a. Employment

         b. Upgrading

         c. Demotion, promotion or transfer

         d. Recruiting or recruitment advertising

         e. Layoff or termination

         f. Rates of pay or other compensation

         g. Selection for training, including apprenticeship.

   c. To **take action on** any **complaints** filed with the Contractor by a handicapped individual charging non-compliance with the requirements of the Rehabilitation Act of 1973 — The Contractor will

      i. Investigate the complaint

      ii. Take appropriate action consistent with 20 CFR §741.29 within 60 days

iii. Inform the complainant of the right to appeal to the Department of Labor if Contractor's decision is adverse to complainant.
iv. Maintain a record of the complaint and the action taken for 3 years.

d. To comply with the rules and regulations of the Secretary of Labor (as published in 20 CFR Chapter VI, Part 741).

4. **Additional Duty: Establishing an Affirmative Action Program**

IF

The Contract

a. Is to be performed in 90 days or more and
b. Is for an amount **less than $500,000**

THEN

The Contractor must, in addition to its basic duties, agree to:

a. Establish an affirmative action consistent with guidelines and rules of the Secretary of Labor
b. Publish the program in such a manner that a copy is distributed to all personnel
c. Review the program annually (on or before March 31) and make appropriate changes
d. Designate a principal official to be responsible for establishment and operation of the affirmative action program
e. Permit examination of its pertinent books, documents, and records by
  i. Appropriate contracting agency officials or
  ii. The Assistant Secretary of Labor for Employment Standards or his designee.
f. Post, in places conspicuous to **employees and applicants,** notices in the form prescribed by the Assistant Secretary of Labor for Employment Standards stating
  i. The Contractor's legal obligation to take affirmative action and to employ and advance qualified handicapped persons and
  ii. The rights and remedies available to handicapped persons.
g. To **notify each labor union or representative of** workers with whom Contractor has a collective bargaining agreement or other understanding that
  i. Contractor is bound by Sec. 503 of the Rehabilitation Act and
  ii. Is committed to take affirmative action to employ and advance physically and mentally handicapped individuals.

5. **Additional Duty: Reporting Requirements**

IF

The Contract is for

a. Performance in **90 days or more and**
b. **$500,000 or more**

THEN

The Contractor must, in addition to its basic and affirmative action duties, agree to:

a. **Submit** a copy of its affirmative action program within 90 days of the contract award
b. **Submit** a summary report to the Assistant Secretary of Labor for employment standards by March 31 of each year **during** performance and the year **following** completion of the contract in the form prescribed by the Assistant Secretary covering the Contractor's
  i. Employment and complaint experience
  ii. Accommodations made, and
  iii. All steps taken to effectuate commitments set forth in the affirmative action program.

6. **Complaints**

a. **Filing** by the handicapped

Any handicapped employee or applicant may file in writing by himself or by an authorized representative a complaint alleging violation of the clause

  i. In all cases with the Contractor, **OR**
  ii. With the Department of Labor, but only

IF

(a) The individual has gotten certification of his handicap and of having benefitted in employability from a service provided under Titles I and III of the Rehabilitation Act of 1973

AND

(b) The Contractor has no internal review procedure or

(c) The Contractor has an internal review procedure **and** 60 days has passed from the date of filing with the Contractor

(d) **And, no more than 180 days** has elapsed since the alleged **violation**

NOTE: Extensions may be granted for good cause

b. **Contractor's Duties**

The Contractor's duties are those included in the basic contracting duties. Where the Contractor has established an internal review procedure a fair, expeditious and effective hearing must be given on the complaint following the Contractor's investigation.

c. **Investigation** of a complaint may be made

i. By the Department of Labor, which may

(a) retain jurisdiction over any complaint made directly to it — or it may refer the complaint to the contracting agency.

(b) take jurisdiction over any complaint pending before an agency when considered necessary to achieve the purposes of the act and

(c) Then conduct or have conducted appropriate investigations and hearings, make findings, issue recommendations and request appropriate agency action.

ii. By the **Contracting Agency** which shall

(a) On each complaint referred to it.

(i) Institute a prompt investigation

(ii) Develop a case record

(iii) Inform the Assistant Secretary of Labor if no violation is found.

(iv) Attempt to resolve violations by informal means if possible.

(b) Process the complaint within 60 days — or a justifiable longer period — and send to the Assistant Secretary of Labor

(c) The case record and

(i) a summary report containing

(a) The name and address of complainant

(b) A brief summary of findings

(c) A statement of the disposition of the case and any corrective actions taken or penalties imposed, or recommendations for such actions

d. **Formal Hearings**

i. A formal hearing may be held on request when

a. An apparent violation of the clause is not resolved by informal means.

b. The agency or Assistant Secretary of Labor proposes to debar the Contractor.

ii. Agency Hearings will be conducted under the established procedures of the particular agency involved.

iii. **When the Assistant Secretary has assumed jurisdiction** the hearings will be conducted under the provisions of (the Service Contract Act,) 29 CFR Part 6.

e. **Decisions, Appeals and Reconsideration**

i. Final resolutions by the Contracting Agency may be appealed to the Assistant Secretary of Labor by **requesting him to assume jurisdiction**

ii. All agency decisions to debar a Contractor must be approved by the Assistant Secretary of Labor before they are effective.

iii. After a showing of reasonable cause by either the Contractor or complainant or on his own motion decisions may be reconsidered by or on the order of the Agency Head or the Assistant Secretary of Labor

7. **Penalties and Sanctions**

For violations of the clause the Govenment may

a. **Withhold** progress payments accrued on any contract between the Government and the Contractor as authorized by the procurement regulations.

b. **Suspend** or **Terminate** the contract in whole or in part.

c. **Debar** the Contractor from receiving future contracts.

NOTE:
The Assistant Secretary of Labor will notify all agency heads of any sanctions imposed against the Contractor.

d. Seek **judicial relief** for breach of contract or specific performance of the clause **in addition** to or in place of the foregoing administration remedies.

Flow Down

Required for all non-exempt subcontracts at all tiers.

Special Notes

1. **Statutory Exemptions**

   The following are exempted from the operation of the clause:

   a. Contracts and subcontracts for less than $2,500.

   b. Contracts and subcontracts for indefinite quantities, which are expected to amount to less than $2,500 during the year.

   c. Contracts and subcontracts with regard to work to be carried on outside the United States by workers not required in the United States.

   d. Any agency, instrumentality or subdivision of a state or local government which is not involved in work under a contract or subcontract with the state or local government.

2. **Administrative Exemptions and Withdrawal of Exemption**

   a. The Assistant Secretary of Labor may exempt from the requirements of the clause.
      i. Such facilities of the Contractor which are in **all** respects separate and distinct from activities related to contract performance
      ii. When he finds that such exemption will not impede effectuation of the Rehabilitation Act of 1973.

   b. The Assistant Secretary may withdraw any exemption, except those for indefinite quantity contracts, as it applies to any contract or group of contracts when in his judgment such action is necessary or appropriate to achieve the purposes of the act. Such withdrawals shall be only of **prospective effect.**

3. **Waivers**

   a. The head of an agency may, with the concurrence of the Assistant Secretary, exempt
      i. Any contract from any or all requirements of the clause when he deems that special circumstances in the national interest so require.
      ii. Any group of contracts of the same type when
         (a) It is in the national interest
         (b) It is impractical to act on each individual request
         (c) Group exemption will contribute substantially to convenient administration.

   b. The head of an agency may exempt a contract from the requirements of the clause when he determines
      i. The contract is essential to national security
      ii. Award without requiring compliance is necessary to national security.

4. **Affirmative Action: Outreach** and **Positive Recruitment**

   a. Contractors shall review their programs and undertake appropriate activities for outreach and recruitment. Examples of such activities are: (1) Development of internal communication and administrative procedures; (2) Using recruiting services and resources of state and local government, labor organizations, and educational institutions; (3) Meaningful contacts with appropriate vocational social services organizations; (4) Use of appropriate media.

   b. The Contractor's duty to list job openings with state employment security agencies, imposed in the ''Listing of Employment Opportunites'' clause will be used by those state agencies to refer qualified handicapped individuals.

   c. The **Scope** of the Contractor's efforts shall depend on **all** the circumstances, including existent employment practices and the Contractor's **Size** and **Resources.**

I-4

I-5 EQUAL OPPORTUNITY (1972 AUG)

During the performance of this contract, the Contractor agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising: layoff or termination, rates of pay or other forms of compensation; selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

(2) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding a notice to be provided by the agency Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

5. **Affirmative Action: Accommodation to Physical and Mental Limitations of Employees** I-4

   a. The Contractor must attempt to make reasonable accommodations unless the Contractor can demonstrate that such accommodations would impose an undue hardship on the conduct of the Contractor's business.

   b. In determining the extent of the Contractor's accommodation obligation the following factors may be considered among others:

      i. Business necessity
      ii. Financial costs and expenses
      iii. Resulting personnel problems.

6. **Affirmative Action: Collective Bargaining Agreements**

   Whenever Contractor compliance with the clause requires revision of a collective bargaining agreement.

   a. The Labor organization shall be given adequate opportunity to present its views to the contracting agency or, if he has assumed jurisdiction, the Assistant Secretary.

   b. The Secretary of Labor will use his best efforts to directly and indirectly cause any labor organization or representative to cooperate with and assist in the implementation of the purposes of the Rehabilitation Act of 1973.

7. **Affirmative Action: Criteria for Good Faith Efforts**

   By October 1, 1975 the Assistant Secretary will promulgate criteria for defining good faith effort to effectuate and carry out affirmative action programs.

8. **Certification of Experience under Clause**

   Effective January 1, 1976, all Contractors will be required to complete a certificate relating to the prior acceptance of duties under the clause and the Contractor's compliance. No contract will be awarded to a Contractor who indicates that

   a. Required programs have not been published
   b. Annual reports have not been submitted
   c. A good faith effort has not been made to carry out an affirmative action program

9. **Intimidation** and **Interference**

   The agency or Assistant Secretary of Labor may exercize **all sanctions** and penalties available under the clause to any Contractor or Subcontractor who fails to take **all necessary steps** to insure that **no person** intimidates, threatens, coerces or discriminates against **any** individual for the purpose of interfering with any activity related to the administration of the Rehabilitation Act of 1973. Protected activities include, but are not limited to: Filing complaints; furnishing information; assisting an investigation; participating in an investigation or hearing.

10. **Incorporation of Clause**

   The clause is incorporated by the operation of the act in every non-exempt contract. It may be incorporated by agency regulation in any unwritten contract between the agency and a Contractor.

EQUAL OPPORTUNITY

I-5

References

ASPR 7-402.17, incorporates 7-103.18 (1972 AUG) in accordance with 12-805
FPR 1-7.202-18, incorporates 1-12.803-2
HEW-315 (Rev. 12/72)

Source of Clause

Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967; (see also Department of Labor Regulations, 41 CFR 60.)

Purpose of Clause

To promote equal employment for all persons by prohibiting employment discrimination in Government contracts on the bases of race, color, religion, sex or national origin.

I-5 (4) The Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967, and by the rules, regulations, and orders of the Secretary of Labor or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(6) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of said rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967, so that such provisions will be binding upon each Subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for non-compliance: **Provided,** however, that in the event the Contractor becomes involved in, or is threatened with litigation with a Subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

Comment

1. **Prohibitive requirements**

The Contractor agrees **not to discriminate** against any person employed or seeking employment on the bases of:

- a. race
- b. color
- c. religion
- d. sex
- e. national origin.

2. **Affirmative Requirements**

- a. **In employment,** the Contractor agrees
  - i. **to take affirmative action** to ensure that applicants and employees are treated in a nondiscriminatory manner. Such action must cover, but is not limited to,
    - (a) **general employment conditions** (e.g. upgrading, demotion or transfer, recruitment and recruitment advertising, layoffs and terminations.)
    - (b) **rates of pay** or other forms of compensation
    - (c) **opportunities for advancement** (e.g. selection for training, apprenticeship).
  - ii. **to post a notice** (as provided by the Contracting Officer) in places conspicuous to applicants and employees setting forth its agreement not to discriminate.
- b. **In job offers, solicitations, and advertisements,** the Contractor must state that **all qualified applicants will be considered,** regardless of race, color, religion, sex, or national origin.
- c. **In union relationships,** the Contractor must
  - i. send each labor union a worker representative with which it has any agreement, contract, or understanding a notice (as provided by the Contracting Officer) advising the union or representative of its obligations under this clause.
  - ii. post copies of the notice in places conspicuous to applicants and employees.

3. **Other requirements**

In complying with the applicable executive orders and the rules and regulations of the Department of Labor, the Contractor must

- a. **make certain required representations:** (either in the solicitation form or in the contract)
  - i. it must certify that **its facilities are not segregated,** if the contract exceeds $10,000.
  - ii. it must disclose
    - a. whether it has **previously contracted** with the Government **and, if so,**
    - b. whether it has filed all prior required **compliance reports.**
  - iii. it must certify that it has developed and maintained an **affirmative action program** (required if the contract is for $50,000 or more **and** the Contractor has 50 employees or more).
- b. **undergo a pre-award compliance review** (see also ''Equal Opportunity Pre-award Clearance of Subcontractors'' clause).

  This is required of **both** Contractors and Subcontractors when the award may exceed $1 million.
- c. **undergo regular compliance reviews**

  To insure continued compliance with the equal opportunity requirements.
- d. **provide information and reports, and access to books, records, and accounts** as may be required by the contracting agency or the Department of Labor to insure compliance with the equal opportunity requirements.

4. **Exempted Contracts and Subcontracts**

Contracts, and subcontracts, are exempt from the requirements of this clause **IF**

- a. less than $10,000 is involved, or
- b. the work thereunder is to be performed outside the United States and involves employees who were **not recruited** in the United States, or
- c. they are exempted by the Secretary of Defense for reasons of **National Security,** or
- d. the Director of the Department of Labor Contract Compliance Office determines that an exemption is required in the **national interest.**

Facilities of Contractors and Subcontractors which are **separate and distinct** from the relevant contract

I-5

I-6 EQUAL OPPORTUNITY PRE-AWARD CLEARANCE OF SUBCONTRACTORS (1971 OCT)

Notwithstanding the clause of this contract entitled ''Subcontracts,'' the Contractor shall not enter into a first-tier subcontract for an estimated or actual amount of $1,000,000 or more without obtaining in writing from the Contracting Officer a clearance that the proposed Subcontractor is in compliance with equal opportunity requirements and therefore is eligible for award.

or subcontract **may** be exempted from the requirements of the clause **if** such an exemption will not frustate the objectives of the clause. I-5

5. **Enforcement**

IF

the Contractor does not comply with the Equal Oportunity Requirements, **THEN**

a. the contract may be cancelled, terminated, or suspended, in whole or in part.
b. the Contractor may be debarred as a Government Contractor.
c. criminal proceedings may be initiated against it for providing false information.
d. other sanctions, penalties, or remedies may be imposed or invoked (as provided by the executive order, the Labor Department, or law).

Flow Down

Required

The Contractor must

1. include this clause in all subcontracts that exceed $10,000, **AND**
2. take any action required by the contracting agency to enforce compliance with it

If, as a result of action directed by the contracting agency, the Contractor is threatened with or becomes involved in litigation with the Subcontractor, the Contractormay request the Government to enter the litigation. The Government will do so **only** to protect its **own** interests.

Special Notes

1. Although there is **no specific age discrimination** clause in either the ASPR or the FPR, **both prohibit** Contractors or Subcontractors from
   a. **specifying a maximum age limit** in solicitations or advertisements for employment on Government contracts, or
   b. **discriminating** against persons because of their age in any aspect of employment **unless** such is based on a bona fide job occupational qualification, retirement plan, or statutory requirement (Executive order 11141, 12 February 1964; ASPR 12-901; FPR 1-12, 1001)
2. If for any reason the ''Equal Opportunity'' clause is omitted from a non exempt contract, **the clause will still be read into the contract** (ASPR 12-804(d); (FPR §1-12.803-8). Similarly, the prohibition against unjustified age discrimination will apply to all non-exempt contracts.
3. **Disputes** relating to the equal opportunity program **will not be handled under the "Disputes" clause.** They must be handled through the informal and formal procedures specified by the Department of Labor and implemented by its Federal Contract Compliance Office (see 41 CFR 60 subpart B).

EQUAL OPPORTUNITY PRE-AWARD CLEARANCE OF SUBCONTRACTORS I-6

Reference

ASPR 7-402.8(d) incorporates 7-104.22 (1971 OCT)

Source of Clause

Regulation implementing Executive Order 11246, 24 September 1965, as amended by Executive Order 11375, 13 October 1967.

Purpose of Clause

To prevent large first-tier subcontracts with parties who do not comply with the equal opportunity requirements.

Comment

1. **Equal Opportunity Requirements**

The ''Equal Opportunity'' clause (see its discussion) generally requires the Contractor or Subcontractor to

I-6

I-7 INSURANCE — LIABILITY TO THIRD PERSONS (1966 DEC)

(a) The Contractor shall procure and thereafter maintain workmen's compensation, employer's liability, comprehensive general liability (bodily injury) and comprehensive automobile liability (bodily injury and property damage) insurance, with respect to performance under this contract, and such other insurance as the Contracting Officer may from time to time require with respect to performance under this contract; **provided,** that the Contractor may with the approval of the Contracting Officer maintain a self-insurance program, and **provided further,** that with respect to workmen's compensation the Contractor is qualified pursuant to statutory authority. All insurance required pursuant to the provisions of this paragraph shall be in such form, in such amounts, and for such periods of time, as the Contracting Officer may from time to time require or approve, and with insurers approved by the Contracting Officer.

(b) The Contractor agrees, to the extent and in the manner required by the Contracting Officer, to submit for the approval of the Contracting Officer any other insurance maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement hereunder.

(c) The Contractor shall be reimbursed: (1) for the portion allocable to this contract of the reasonable cost of insurance as required or approved pursuant to the provisions of this clause, and (2) without regard to and as an exception to the ''Limitation of Cost'' or the ''Limitation of Funds'' clause of this contract, for liabilities to third persons for loss of or damage to property (other than property (A) owned, occupied or used by the Contractor or rented to the Contractor, or (B) in the care, custody, or control of the Contractor), or for death or bodily injury, not compensated by insurance or otherwise, arising out of the performance of this contract, whether or not caused by the negligence of the Contractor, his agents, servants or employees, **provided** such liabilities are represented by final judgments or settlements approved in writing by the Government, and expenses incidental to such liabilities, except liabilities (I) for which the Contractor is otherwise responsible under the express terms of the clause or clauses, if any, specified in the Schedule, or (II) with respect to which the Contractor has failed to insure as required or maintain insurance as approved by the Contracting Officer or (III) which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of (1) all or substantially all of the Contractor's business, or (2) all or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed, or (3) a separate and complete major industrial operation in connection with the performance of this contract. The foregoing shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required to be submitted for approval or required to be procured and maintained pursuant to the provisions of this clause, **provided** such cost would constitute Allowable Cost under the clause of this contract entitled ''Allowable Cost, Fixed Fee and Payment.''

(d) The Contractor shall give the Government or its representatives immediate notice of any suit or action filed, or prompt notice of any claim made, against the Contractor arising out of the performance of this contract, the cost and

a. maintain nondiscrimintory hiring and employment practices and policies, AND
b. take affirmative action to see that employees and applicants are treated fairly and without regard to race, color, religion, sex, or national origin.

2. **Subcontract pre-award compliance review**

The Contractor **may not enter** into a first-tier subcontract for an estimated or actual amount of $1 million or more **UNLESS**

a. the Subcontractor has had **a pre-award compliance review, AND**
b. the Contracting Officer has issued a **written clearance** stating that the Subcontractor is in compliance with the equal opportunity requirements.

3. **Condition for post-award compliance review** (available only under ASPR)

When the pre-award clearance cannot be obtained without missing the deadline for the award of the contract, the head of the procuring activity may authorize the award to be made, subject to a post-award compliance review made as soon as possible but always within 30 days after the date of the award (see ASPR 12-808.2(d)2 and 12-808.3(c)).

Flow Down

Not required.

Special Notes

The FPR does **not** have a specific ''Pre-Award Clearance of Subcontractors'' clause. However, it and the ASPR incorporate regulations of the Department of Labor which require that the Contractor and known $1 million or more Subcontractors undergo compliance reviews **before the contract itself is awarded.** (See ''Equal Opportunity'' clause; see 41 CFR 60 subpart B.)

INSURANCE — LIABILITY TO THIRD PERSONS

I-7

References

ASPR 7-402-26(a) with proviso (1962 SEP), incorporates 7-203.22 (1966 DEC). See also 7-402-26(b) (1960 OCT) and Sect. 10. Part 5 (ASPR)
FPR 1-7.202-22

Source of Clause

Regulation

Purpose of Clause

To protect against uncertainty by requiring basic types of insurance in Government contracts. To specify conditions under which Contractors wil be reimbursed for liabilities to third parties arising from performance under the contract.

Comment

1. **Basic Insurance Requirements**

With respect to the contract, the Contractor

a. Must maintain the following types of insurance:
   i. **Workmen's Compensation** — to the extent required by the applicable state laws.
   ii. **Employer's Liability** — (usually for at least $100,000 under ASPR).
   iii. Comprehensive **General Liability** for **Bodily Injury — at least** (under ASPR)
      (a) $50,000 per person
      (b) $100,000 per accident.
   iv. Comprehensive **automobile liability** for **bodily injury and property damage — at least** (under ASPR)
      (a) $50,000 per person and $100,000 per accident for bodily injury
      (b) $5,000 per accident for property damage.
   v. And such other insurance as may be required by the Contracting Officer.

expense of which may be reimbursable to the Contractor under the provisions of this contract and the risk of which is then uninsured or in which the amount claimed exceeds the amount of coverage. The Contractor shall furnish immediately to the Government copies of all pertinent papers received by the Contractor. If the amount of the liability claimed exceeds the amount of coverage, the Contractor shall authorize representatives of the Government to collaborate with counsel for the insurance carrier, if any, in settling or defending such claim, if the liability is not insured or covered by bond, the Contractor shall, if required by the Government, authorize representatives of the Government to settle or defend any such claim and to represent the Contractor in or take charge of any litigation in connection therewith; **provided,** however, that the Contractor may, at his own expense, be associated with the representatives of the Government in the settlement or defense of any such claim or litigation.

(End of clause)

(a) **If the Contractor claims partial immunity from tort liability as a state agency or as a charitable institution (as where work may be permitted under the contract in a place or under conditions where the Contractor is not immune from tort liability), the following may be added to the clause in 7-203.22:**

(e) Notwithstanding paragraphs (a) and (c) of this clause, (i) the Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for his liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract hereunder; and (ii) the Contractor need not procure or maintain insurance coverage as provided in paragraph (a) of this clause; **provided,** the Contractor may obtain any insurance coverage he deems necessary subject to approval by the Contracting Officer as to form, amount, and duration, in which event the Contractor shall be reimbursed (A) for the cost of such insurance and (B) to the extent provided in paragraph (c) above, for liabilities to third persons for which the Contractor has obtained insurance coverage as provided in this paragraph, but for which such coverage is insufficient in amount. (1962 SEP)

In the foregoing clause, substitute in contracts of the Department of the Navy the words ''the Department'' for the words ''the Contracting Officer.''

(b) **If the Contractor claims total immunity from tort liability as a state agency or as a charitable institution, the following clause may be used in lieu of the clause in 7-203.22:**

LIABILITY TO THIRD PERSONS (1960 OCT)

(a) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for his liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract hereunder.

(b) The Contractor shall give the Government or its representatives immediate notice of any suit or action filed, or prompt notice of any claim made, against the Contractor arising out of the performance of this contract, the cost and expense of which may be reimbursable to the Contractor under the provisions of this contract. The Contractor shall furnish immediately to the Government copies of all pertinent papers received by the Contractor. The Contractor shall, if required by the Government, authorize representatives of the Government to settle or defend any such claim and to represent the Contractor in or take charge of any litigation in connection therewith. The Contractor may, at his own expense, be associated with the representatives of the Government in the settlement or defense of any such claim or litigation.

- b. May be reimbursed for other insurance maintained in connection with its performance of the contract if such insurance is approved by the
  - i. Contracting Officer, or
  - ii. Is an allowable cost under the ''Allowable Cost'' clause.
  - iii. May maintain a self-insurance program, with the approval of the Contracting Officer.

2. **Contracting Officer Approval of Required Insurance**

The Contracting Officer must

- a. Prescribe or approve
  - i. The form
  - ii. The amounts, and
  - iii. The coverage periods

  of the insurance required under the contract.
- b. Approve the insurers.

3. **Allowable Costs**

Insurance premiums and other costs of **required or approved** insurance are allowable costs to the extent that they are

- a. Reasonable, and
- b. Allocated to the contract.

4. **Reimbursement for Liabilities to Third Parties**

- a. The Contractor shall be reimbursed for liabilities to third parties (and incidental expenses) **if** the liability
  - i. Arises from the performance of the contract, and
  - ii. Is the result of
    - (a) A final judgement, or
    - (b) A settlement **approved in writing** by the Government.
- b. Such reimbursement shall be made regardless of whether the liability is
  - i. Compensated by insurance or otherwise, or
  - ii. Caused by the negligence of the Contractor, its agents, servants, or employees.
- c. This clause operates as an exception to the ''Limitation of Cost'' and ''Limitation of Funds'' clauses.

5. **Contractor's Duties Concerning Actions or Claims Arising from Performance of the Contract**

IF

- a. A suit or action is filed or a claim is made against the Contractor arising from performance of the contract, and
- b. The cost or expense of such may be reimbursble to the Contractor under the contract, and
- c. The risk of such is uninsured, or the amount sought exceeds the amount of insurance coverage

THEN

the Contractor must

- a. **Give** the Government or its representatives **immediate notice** of such suit, action, or claim
- b. **Immediately furnish** the Government with copies of all pertinent papers it receives, and
- c. (If the liability is not insured or covered by a bond and the Government so requests) **authorize** representatives of the Government to
  - i. Settle or defend such claims, and
  - ii. represent the Contractor in, or take charge of, any resulting litigation.
- d. (If the amount of the liability exceeds the amount of coverage) **authorize** representatives of the Government to join with the lawyer for its insurance company in settling or defending such claim.

  ALSO

  the Contractor may, **at its own expense,** work with the Government representatives in the settlement or defense of any such claim or litigation.

6. **Limitations on Reimbursement for Liabilities to Third Parties**

I-8 LISTING OF EMPLOYMENT OPENINGS (1973 SEP)

(This clause is applicable pursuant to 41 CFR 50-250 if this contract is for $2,500 or more.)

(a) The Contractor, to provide special emphasis to the employment of qualified disabled veterans and veterans of the Vietnam era, agrees that all suitable employment openings of the Contractor which exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract and including those occurring at an establishment of the Contractor other than the one wherein the contract is being performed but excluding those of independently operated corporate affiliates, shall be offered for listing at the appropriate office of the State employment service system wherein the opening occurs and to provide reports to such office regarding employment openings and hires as may be required.

(b) Listing of employment openings with the employment service system pursuant to this clause shall be made at least concurrently with the use of any other recruitment service or effort and shall involve the normal obligations which attach to the placing of a bona fide job order, including the acceptance of referrals of veterans and non-veterans. Listing of employment openings does not require the hiring of any particular job applicant or from any particular group of job applicants referred by the employment service system. Nothing contained herein is intended to relieve the Contractor from any requirements in any Executive Order or regulation regarding non-discrimination in employment.

The Contractor will **not be reimbursed** for liabilities to third parties I-7

a. Where there is an **express** provision of the contract to that effect.

b. With respect to which the Contractor did not
  - i. Obtain insurance as required by the contract, or
  - ii. Maintain insurance as approved by the Contracting Officer.

c. Which result from **willful misconduct** or **lack of good faith** on the part of any of the Contractor's directors, officers, managers, superintendents, or other equivalent representatives.

d. Which result from damage to property
  - i. Owned, occupied, or used by the Contractor
  - ii. Rented to the Contractor, or
  - iii. In the care, custody, or control of the Contractor (see Special Note #4).

Flow Down

Not Required

Special Notes

1. In contracts with the Navy, substitute ''The Department'' for ''Contracting Officer.''
2. Partial Tort Immunity (ASPR only) **IF** the Contractor claims partial tort immunity as
   a. A state agency (e.g. a state university or college), or
   b. A charitable institution

   THEN this clause may be modified
   a. To provide that
      1. The Contractor need not procure or maintain insurance, **AND**
      2. The Government does **not** assume **any** liability for injuries to third persons.
   b. To provide that the Contractor
      1. May obtain such insurance as it deems necessary, subject to the Contracting Officer's approval, and
      2. Shall be reimbursed for
         a. The cost of such insurance,
         b. Liabilities covered by such insurance, but in excess of the coverage amount.

   (This clause may be used by State Universities forbidden by State Law to purchase insurance.)
3. **Total tort immunity** (again, only under ASPR). This additional provision is unclear and self-contradictory. On one hand, **if** the Contractor claims total tort immunity, **then** it shall **not be reimbursed** for any liability to third persons. On the other hand, **if** the Contractor believes that a suit or claim against it **may result** in a reimbursable expense, **then** the Government must be immediately notified, etc.
4. The Contractor's responsibilities for loss of or damage to **Government** property are set out in the ''Government Property'' clause.

LISTING OF EMPLOYMENT OPENINGS I-8

References

ASPR 7-402.34 incorporates 7-103.27 (1973 SEP)
FPR 1-7.202-35 incorporates 1-12.1102-2
HEW-315 (Rev. 12/72)

Source of Clause

Regulation authorized by 38 U.S.C. §2012 (1972 Supp.), 86 Stat. §1097; Executive order 11701, 24 Jan. 1973, 38 F.R. 2675; 41 CFR Part 50-250.

I-8 (c) (1) Reports required shall include, but not be limited to, periodic reports which shall be filed at least quarterly with the appropriate local State employment service office or, where the Contractor has more than one establishment in a State, with the central office of that State employment service. Such reports shall indicate for each establishment (i) the number of individuals who were hired during the reporting period, (ii) the number of those hired who were disabled veterans, and (iii) the number of those hired who were non-disabled veterans of the Vietnam era. The Contractor shall maintain copies of the reports submitted until the expiration of one year after final payment under the contract, during which time they shall be made available, upon request, for examination by any authorized representatives of the Contracting Officer or the Secretary of Labor.

(2) Whenever the Contractor becomes contractually bound to the listing provisions of this clause, he shall advise the employment service system in each state wherein he has establishments, of the name and location of each such establishment in the State. As long as the Contractor is contractually bound to these provisions and has so advised the State employment service system, there is no need to advise the State system of subsequent contracts. The Contractor may advise the State system when he is no longer bound by this contract clause.

(3) If the Contract is for less than $10,000 or if it is with a State or local government, the procedures set forth in subparagraphs (1) and (2) of this paragraph (c) are not required.

(d) This clause does not apply to the listing of employment openings which occur and are filled outside the 50 States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

(e) This clause does not apply to openings which the Contractor proposes to fill from within his own organization or to fill pursuant to a customary and traditional employer-union hiring arrangement. This exclusion does not apply to a particular opening once an employer decides to consider applicants outside of his own organization or employer-union arrangements for that opening.

(f) As used in this clause:

(1) ''All suitable employment openings'' includes, but is not limited to, openings which occur in the following job categories: production and nonproduction; plant and office; laborers and mechanics; supervisory and nonsupervisory; technical; and executive, administrative, and professional openings which are compensated on a basis of less than $18,000 per year. This term includes full-time employment, temporary employment of more than three (3) days' duration, and part-time employment.

(2) ''Appropriate office of the State employment service system'' means the local office of the Federal-State national system of public employment offices with assigned responsibilities for serving the area of the establishment where the employment opening is to be filled, including the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

(3) ''Openings which the Contractor proposes to fill from within his own organization'' means employment openings for which no consideration will be given to persons outside the Contractor's organization (including any affiliates, subsidiaries, and the parent companies), and includes any openings which the Contractor proposes to fill from regularly established ''recall'' and ''rehire'' lists.

(4) ''Openings which the Contractor proposes to fill from within his own organization or to fill pursuant to a customary and traditional employer-union hiring arrangement'' means employment openings for which no consideration will be given to persons outside of a special hiring arrangement, including openings which the Contractor proposes to fill from union hiring halls, which is part of the customary and traditional employment relationship existing between the Contractor and representatives of his employees.

(5) ''Disabled veteran'' means a person entitled to disability compensation under laws administered by the Veteran's Administration for disability rated at thirty percent (30%) or more, or a person whose discharge or release from active duty was for a disability incurred or aggravated in line of duty.

(6) ''Veteran of the Vietnam era'' means a person who was discharged or released within the 48 months preceding his application for employment covered under this part and who (i) served on active duty for a period of more than 180 days, any part of which occurred after August 5, 1964, and was discharged or released therefrom with other than a dishonorable discharge, or (ii) was discharged or released from active duty for service-connected disability if any part of such duty was performed after August 5, 1964.

(g) The Contractor agrees to place this clause (excluding this paragraph (g)) in any subcontract directly under this contract **provided,** such subcontract is for $2,500 or more. (Subcontracts for personal services are exempted from this requirement.)

(h) Failure of the Contractor to comply with the requirements of this clause may result in termination for default of the contract concerned.

Purpose of Clause

To publicize employment opportunities available under Government contracts. To give special emphasis to the employment of qualified disabled veterans and veterans of the Vietnam era.

Comment

1. **Listing of Employment Openings**

   The Contractor agrees to list all ''suitable employment openings'' with the office of the state employment service serving the area where the opening is.

   a. Such listing shall
      - i. be made at least concurrently with the use of other recruitment services or efforts.
      - ii. include openings
        - (a) which exist when the contract is executed or while it is performed,
        - (b) whether or not created by this contract, **AND**
        - (c) regardless of location.

   b. ''Suitable employment openings''
      - i. include, among others
        - (a) production and non-production jobs
        - (b) plant and office jobs
        - (c) executive, administrative and professional openings paying **less than** $18,000 yearly
        - (d) full-time, temporary for more than 3 days, or part-time employment.
      - ii. does **not** include
        - (a) those available only to people already within the Contractor's organization, or on ''recall'' or ''rehire'' lists.
        - (b) openings to be filled only according to an established customary and traditional employer-union hiring arrangement.
        - (c) executive, administrative and professional openings paying more than $18,000 yearly.

2. **Reports**

   For contracts over $10,000, not made with state or local governments, the Contractor agrees to

   a. Report the name and location of its establishments to the appropriate state employment service.

   b. notify the state employment service system when it first becomes contractually bound to the listing provisions.

   c. provide reports regarding openings and hires to the appropriate employment service office,
      - i. at least quarterly, and within 30 days of the end of each reporting period, detailing for each establishment
        - (a) the total number hired
        - (b) the number of disabled veterans hired
        - (c) the number of ''veterans of the Vietnam era'' (see f(6))
      - ii. as may be further required.

   d. keep copies of his reports available for any examinations requested by authorized representatives of the
      - i. Contracting Officer or
      - ii. Secretary of Labor

      until 1 year after final payment under the contract.

3. This clause does **NOT**

   a. require the hiring of any particular applicant or group of applicants (i.e., no quotas are required).

   b. relieve the Contractor from any requirements not to discriminate in employment.

4. Failure to comply with this clause may lead to termination of the contract by the Government.

Flow Down

Required, under FPR and HEW only for subcontracts directly under the contract and, under ASPR when such subcontract is for $2,500 or more and not for personal services.

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I-9 REQUIRED INSURANCE

(a) The Contractor shall procure and maintain such insurance as is required by law or regulation, including but not limited to, the requirements of Subpart 1-10.5 of the Federal Procurement Regulations (41 CFR 1-10.5), or by the written direction of the Contracting Officer. Prior written approval of the Contracting Officer shall be required with respect to any insurance policy the premiums for which the Contractor proposes to treat as a direct cost under this contract and with respect to any proposed qualified program of self-insurance. The terms of any other insurance policy shall be submitted to the Contracting Officer for approval upon request.

(b) Unless otherwise authorized in writing by the Contracting Officer, the Contractor shall not procure or maintain for its own protection any insurance covering loss or destruction of or damage to Government property.

Special Notes

1. This clause does **not** apply to
   a. contracts for less than $2,500
   b. The listing and filling of employment openings outside of the United States, Puerto Rico, Guam or the Virgin Islands.
2. It shall **not** be ''suitable'' to list an employment opening when to do so would be contrary to national security or the best interests of the Government.
3. The HEW clause differs slightly, but is outdated since it came before the Veterans Employment and Readjustment Act and Executive Order 11701.
4. After the Contractor has first notified the State Employment Service that he is contractually bound to the listing provisions he need not advise it of any subsequent contracts that continue such obligation.
5. Openings of ''independently operated corporate affiliates'' need not be included in the listings and reports required by this clause. Depending on the particular facts, this might apply to local branches of a state-wide university system.

REQUIRED INSURANCE I-9

Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation

Purpose of Clause

To protect the Government against ultimate liability for personal injuries and property damage resulting from work under the contract by requiring certain forms of insurance.

Comment

1. The Contractor must obtain and maintain insurance
   a. As required by local, state or federal law, or
   b. As prescribed by regulation, including, but not limited to, that required under Subpart 1-10.5 or FPR which includes
      i. insurance to comply with workmen's compensation and occupational disease statutes, and employee's liability where available
      ii. bodily injury liability insurance,
      iii. automobile liability insurance covering bodily and property damage, and
      iv. aircraft and vessel liability insurance where applicable, or
   c. As required by written direction of the Contracting Officer.
2. The Contracting Officer must give prior **written** approval in order for the Contractor to
   a. Establish a program of self insurance, as opposed to acquiring a commercial one, or
   b. Treat as direct cost the premiums for any insurance policy.
3. The terms of any insurance policy, the premiums for which are to be treated as indirect costs by the Contractor, shall be submitted to the Contracting Officer upon request.

Flow Down

Not required. However, in cost-reimbursement type subcontracts under cost-reimbursement type prime contracts the Contracting Officer may condition his approval upon the Subcontractor meeting the insurance requirements of FPR Subpart 1-10.5.

Special Notes

The Contractor shall not obtain insurance of Government property for its own protection unless written

I-9

I-10 SAFETY AND ACCIDENT PREVENTION (1969 JUN)

In performing any work under this contract on premises which are under the direct control of the Government, the Contractor shall (i) conform to all safety rules and requirements prescribed in AFM 127-101, as in effect on the date of this contract and (ii) take such additional precautions as the Contracting Officer may reasonably require for safety and accident prevention purposes. The Contractor agrees to take all reasonable steps and precautions to prevent accidents and preserve the life and health of Contractor and Government personnel performing or in any way coming in contact with the performance of this contract on such premises. Any violation of such rules and requirements, unless promptly corrected, as directed by the Contracting Officer, shall be grounds for termination of this contract in accordance with the default provisions hereof.

authorization is provided by the Contracting Officer. For reasons why no insurance is allowed on Government property, see ''Government Property'' clause. Ordinarily, the Contractor is not liable for damage to such property unless it is due to wilful misconduct or lack of good faith by the Contractor. I-9

SAFETY AND ACCIDENT PREVENTION I-10

Reference

Air Force ASPR Supplement 7-104.103 (1969 JUN)

Source of Clause

Regulation

Purpose of Clause

To require accident prevention measures and to promote safe work conditions in the performance of Government contracts.

Comment

1. **Applicability**

   This clause is required to be included in all research and development contracts that are to be performed either wholly or partially on an Air Force base or other Air Force installation under direct Government control.

2. **Requirements**

   The Contractor is required to:

   a. conform to all safety rules and requirements set forth in Air Force Manual 127-101;

   b. take whatever reasonable precautions as the Contracting Officer may require for safety and accident prevention; and

   c. take all other reasonable steps and precautions to prevent accidents and provide for the safety of Contractor and Government personnel coming into contact with any contract work on Air Force property.

3. **Penalty**

   Any violation of the requirements of this clause which is not promptly corrected as directed by the Contracting Officer shall be grounds for termination in accordance with the ''Default'' clause, ASPR 7-103.11

Flow Down

Not required.

Special Notes

In contrast to the ''Termination for the Convenience of the Government'' clause, the ''Default'' clause does not provide for the negotiation of a terminated claim whereby the Contractor is compensated for the expense of cancelling subcontracts and other commitments upon termination. When in default the Contractor alone is liable for these expenses. In addition, the Contractor may be liable to the Government for any excess costs for the procurement of services that were to be performed by the Contractor.

SECTION J
PROPERTY

J-1 BUY AMERICAN ACT (1964 MAY)

(a) In acquiring end products, the Buy American Act (41 U.S.C. 10a-d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) ''components'' means those articles, materials, and supplies, which are directly incorporated in the end products;

(ii) ''end products'' means those articles, materials, and supplies which are to be acquired under this contract for public use; and

(iii) a ''domestic source end product'' means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States or Canada exceeds 50 percent of the cost of all its components. For the purposes of this (a) (iii) (B), components of foreign origin of the same type or kind as the products referred to in (b) (ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products:

(i) which are for use outside the United States;

(ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) as to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) as to which the Secretary determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954, So as to alleviate the impact of Department of Defense expenditures on the United States balance of international payments, bids offering domestic source end products normally will be evaluated against bids offering other end products by adding a factor of fifty percent (50%) to the latter, exclusive of import duties. Details of the evaluation procedure are set forth in Section VI of the Armed Services Procurement Regulation.)

BUY AMERICAN ACT

References

ASPR 7-402.13 incorporates 7-104.3 (1964 MAY) in accordance with ASPR 6-104.5
FPR 1-7.202-14 incorporates 1-6.104-5 (1973 MAY)
HEW - 315 (Rev. 12/72)

Source of Clause

41 U.S.C. §§10a, 10c, 10d (1970) (Buy American Act) and Executive Order 10582, 17 December 1954, 19 F.R. 8723, as amended by Executive Order 11050, 27 September 1962, 27 F.R. 9683.

Purpose of Clause

To protect the American business man and worker and to minimize the impact of Government contracts on the balance of payments, by giving preference to certain domestic materials.

Comment

1. **The Contractor's agreement**
   In essence, the Contractor agrees to restrict its purchases of articles, supplies, or materials on the basis of their origin so that it delivers only ''domestic source end products'' under the contract.
2. **Delivery of domestic source end products**
   a. for **unmanufactured** materials to be delivered as **end products** (not as components) the Contractor agrees to deliver only those **mined** or **produced** in the United States.
   b. for **manufactured** materials, the Contrator agrees to deliver only those **end products**
      i. which are manufactured in the United States **and**
      ii. which **incorporate as components** amounting to at least 50% of the total **component** cost (i.e. not including cost of labor, overhead, etc.) articles, materials, and supplies which
         (a) were mined, manufactured, or produced
            (1) in the United States, or
            (2) in Canada (under ASPR only).
         (b) Even though not mined, manufactured or produced in the United States (or Canada under the ASPR)
            (1) the Government has determined will be similarly treated because they are not mined, manufactured, or produced in the United States in sufficient and reasonably available commercial quantities of satisfactory quality
            (2) the secretary of the applicable agency has determined will be similarly treated because the domestic preference is against the public interest.
3. **Exceptions**
   The Contractor need not deliver domestic source end products (manufactured or not)
   IF
   a. they are for use outside the United States
   b. the Government determines that they are not mined, manufactured, or produced in the United States in sufficient and reasonably available commercial quantities of satisfactory quality, or
   c. the secretary of the applicable agency determines that
      i. the domestic preference is against the public interest, or
      ii. the cost of the domestic source end product is unreasonable.

Flow Down

Not required.

Special Notes

1. The ''United States'' is defined as ''the United States and any place subject to the jurisdiction thereof'' (41 U.S.C. §10c (a)(1970)).
2. A list of materials which may be obtained for use as components or end products without regard to country of origin is found in ASPR §6.105 and, for HEW, in 41 CFR 3-6.105. Procedures for acquiring

J-1

J-2 DUTY-FREE ENTRY FOR CERTAIN SPECIFIED ITEMS (1971 FEB)

(a) Except as otherwise approved by the Contracting Officer, no amount is or will be included in the contract price on account of duty with respect to those supplies that are specifically identified in the Schedule as supplies to be accorded duty-free entry.

(b) The Contractor warrants that all such supplies for which duty-free entry is to be claimed are intended to be delivered to the Government or incorporated in the end items to be delivered under this contract, and that duty shall be paid by the Contractor to the extent that such supplies, or any portion thereof, (if not scrap or salvage), are diverted to nongovernmental use other than as a result of a competitive sale made, directed or authorized by the Contracting Officer.

(c) The Government agrees to execute duty-free entry certificates and to afford such assistance as appropriate in order to obtain the duty-free entry of supplies as to which the shipping documents bear the notation specified in paragraph (d) below, except as the Contractor may otherwise agree.

(d) All shipping documents covering those supplies that are specifically identified in the Schedule as supplies to be accorded duty-free entry, shall consign the shipments to the appropriate Military Department, in care of the particular Contractor including the Contractor's delivery address or the appropriate military installation and shall bear the following information:

- (i) Government prime contract number;
- (ii) identification of carrier;
- (iii) the notation: ''UNITED STATES DEPARTMENT OF DEFENSE — DUTY-FREE ENTRY TO BE CLAIMED pursuant to Schedule 8, Part 3, Item No. 832.00, Tariff Schedules of the United States. Upon arrival of shipment at port of entry, District Director of Customs, kindly release shipment under section 8.59CR and notify the appropriate DCASR for execution of Customs Forms 7501 and 7501A and the Duty-Free Entry Certificate'',
- (iv) gross weight in pounds (if freight is based on space tonnage, state cubic feet in addition to gross shipping weight); and
- (v) estimated value in United States dollars.

(e) The Contractor agrees to instruct the foreign supplier to consign the shipment as specified in (d) above and mark all packages UNITED STATES DEPARTMENT OF DEFENSE to qualify for duty-free and to prepare a sufficient number of copies of the bill of lading (or other shipping document) so that at least two of the copies accompanying the shipment will be available for use by the District Director of Customs at the port of entry.

(f) The Contractor agrees to notify the Contract Administration Office (CAO) in writing of any purchase by the Contractor of foreign supplies identified in the schedule as supplies to be accorded duty-free entry. Such notice shall be furnished to the CAO immediately upon the award by the Contractor to the overseas supplier. The notice shall identify (i) the foreign supplies, (ii) the country of origin, (iii) the prime contract number, and (iv) the scheduled delivery date(s).

(g) The Contractor will make appropriate provisions in subcontracts hereunder to assure that the entire substance of this clause is agreed to be each first — or lower-tier Subcontractor, if any, who will import into the United States, its possessions, or Puerto Rico, supplies identified in the Schedule as supplies to be accorded duty-free entry.

(End of clause)

NOTICE OF IMPORTS — POSSIBLE DUTY-FREE ENTRY (1971 FEB)

(a) Except as provided in paragraph (c) below, the Contractor shall notify the Contracting Officer in writing of any purchase in excess of $10,000 by the Contractor of foreign supplies (including without limitation raw materials, components, and intermediate assemblies) that are to be imported into the United States, its possessions, or Puerto Rico, for delivery to the Government, or for incorporation in end items to be delivered to the Government, under this materials from foreign countries are detailed in ASPR §6.103-2 and are to be established by each affected agency under the FPR. J-1

3. For methods of determining whether obtaining domestic source end products involves unreasonable cost or is against the public interest (especially in view of the Balance of Payments Program) see Executive Order 10582, ASPR 6-104.4, FPR 106.104-4, 1-6.801.
4. It is not always clear whether something is a component or an end product, but generally the mere fact that a thing is not changed by its inclusion in an item does not mean that it is an end product. For example, an identifiable battery in an engine assembly is a component not an end product. See 47 Comp. Gen. 21 (1967).
5. For willful violation of this clause shown by clear and convincing evidence, the Contractor may be debarred. ASPR 1-604.1(ii)(A).

DUTY-FREE ENTRY

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Reference

ASPR 7-403.17 incorporates 7-104.31 (1971 FEB) in accordance with Section VI, Part 6.

Source Of Clause

Regulation pursuant to schedule 8, Part 3, Item No. 832.00, Tariff Schedules of the United States (see also 19 C.F.R. §10.103) and 19 U.S.C. §1309 (1970).

Purpose Of Clause

To eliminate import duty on ''Emergency purchases of war materials abroad'' and ''Certain supplies (not including equipment) purchased for vessels or aircraft operated by the United States'', so that substantial savings in military appropriations will result.

Comment

1. The ''Duty-free entry'' clause is actually two separate clauses, either or both of which may be inserted, **IF**
   a. the contract negotiated and exceeds $100,000, or
   b. the Contracting Officer determines them to be necessary.
2. **"Duty-free entry for certain specified items"**
   a. This clause will be used when the Contracting Officer **definitely** knows that foreign supplies with an estimated aggregate duty greater than $1,000 will be imported for use under this contract.
   b. items **may** enter duty-free under this clause **only** if they are so specified in the schedule.
   c. duty on items specified on the schedule shall not be an allowable cost.
3. **"Notice of imports — possible duty-free entry"**
   a. **Applicability**

      This clause will be used **unless** the Contracting Officer expects that neither the Prime Contractor nor any first tier Subcontractor will make purchases under this contract of foreign supplies (not listed in the schedule as duty-free) greater than $10,000.

   b. **The Contractor's Required Notice**

      The Contractor must **notify** the Contracting Officer whenever it purchases $10,000 or more of foreign supplies which will be imported for

      i. delivery to the Government, or
      ii. incorporation into end items to be delivered under this contract.

   c. The notice should
      i. be written
      ii. be furnished to the Contracting Officer ar least 20 days prior to the entry of any such supplies, and

I-2 contract; **provided**, that if this contract contains any other clause providing for duty-free entry; such notice is not required for any supplies that are to be accorded duty-free entry under any other such clause. Any such notice shall be furnished to the Contracting Officer at least twenty (20) days before the importation of any supplies pursuant to any such purchase. The notice shall identify (i) the foreign supplies, (ii) the estimated amount of duty payable thereon, and (iii) the country of origin.

(b) If, within ten (10) days of any receipt of any notice under (a) above, the Contracting Officer notifies the Contractor in writing that the Government will issue duty-free entry certificates for such foreign supplies, or if the Government otherwise tenders and the Contractor agrees to the issuance of such a duty-free entry certificate, the following subparagraphs shall apply:

(1) Except as otherwise approved by the Contracting Officer, the contract price shall be reduced by (or the allowable cost shall not include) the amount of duty which would be payable if duty-free entry certificates were not issued pursuant to the provisions of this clause.

(2) The Contractor warrants that all such foreign supplies for which duty-free entry certificates are to be issued in accordance with this clause are intended to be delivered to the Government or incorporated in end items to be delivered under this contract, and that duty shall be paid by the Contractor to the extent that such supplies or any portion thereof (if not scrap or salvage), are diverted to non-governmental use other than as a result of a competitive sale made, directed or authorized by the Contracting Officer.

(3) The Government agrees to execute duty-free entry certificates and to afford appropriate assistance in order to obtain the duty-free entry of such foreign supplies as to which, pursuant to subparagraph (4) below, the shipping documents bear the notation specified therein, except as the Contractor may otherwise agree.

(4) All shipping documents submitted to Customs, covering foreign supplies for which duty-free entry certificates are to be issued in accordance with this clause shall consign the shipments to the appropriate (i) Military Department in care of the particular Contractor including the Contractor's delivery address, or (ii) the appropriate military installation and shall bear the following information:

(i) Government prime contract number;

(ii) identification of carrier;

(iii) the notation: ''UNITED STATES DEPARTMENT OF DEFENSE — DUTY-FREE ENTRY TO BE CLAIMED pursuant to Schedule 8, Part 3, Item No. 832.00, Tariff Schedules of the United States. Upon arrival of shipment at port of entry, District Director of customs, kindly release shipment under section 8.59CR and notify the appropriate DCASR for execution of Customs Forms 7501 and 7501A and the Duty-Free Entry Certificate.''

(iv) gross weight in pounds (if freight is based on space tonnage, state cubic feet in addition to gross shipping weight); and

(v) estimated value in United States dollars.

(5) The Contractor agrees to instruct the foreign supplier to consign the shipment as specified in (4) above and mark all packages UNITED STATES DEPARTMENT OF DEFENSE to qualify for duty-free entry and to prepare a sufficient number of copies of the bill of lading (or other shipping document) so that at least two of the copies accompanying the shipment will be available for use by the District Director of Customs at the port of entry.

(6) The Contractor agrees to notify the Contract Administration Office (CAO) in writing of any purchase by the Contractor of foreign supplies for which duty-free entry certificates are to be issued in accordance with this clause. Such notice shall be furnished to the CAO immediately upon notification from the Contracting Officer that duty-free entry will be accorded the supplier. The notice shall identify (i) the foreign supplies, (ii) the country of origin, (iii) the prime contract number, and (iv) the scheduled delivery date(s).

(c) This clause shall not apply to purchases of foreign supplies in connection with this contract if (i) such foreign supplies are identical in nature with supplies purchased by the Contractor of any Subcontractor hereunder in connection with his commercial business, and (ii) segregation of such supplies to insure use only on Government contracts containing duty-free entry provisions is not economical or feasible.

(d) The Contractor agrees to insert the substance of this clause in any first-tier subcontract hereunder in connection with which foreign supplies in excess of $10,000 may be imported by the Subcontractor into the United States, its possessions, or Puerto Rico.

(End of clause)

- iii. identify
  - a. the foreign supplies
  - b. the country of origin, and
  - c. the estimated amount of duty payable.

d. Issuing the Certificate

Duty-free certificates will be issued

- i. **If** the Contracting Officer notifies the Contractor, **in writing and within 10 days** of receiving the Contractor's required notice, that the Government will issue duty-free certificates, or
- ii. **if** the Contractor **agrees to** the issuance of duty-free certificates after such time.

e. Duty not an allowable cost

if duty-free certificates are issued **then** any duty which would have been payable otherwise shall not be an allowable cost. (However, **if** as provided above, the Contractor does **not** agree to the issuance of duty-free certificates, the duty paid shall be an allowable cost.)

4. Provisions Common to Both Clauses

a. The **Contractor agrees**

- i. to **notify** the Contract Administration Office (CAO) after
  - (a) awarding any subcontract for supplies specified as duty-free in the schedule, or
  - (b) being notified by the Contracting Officer of, or
  - (c) agreeing to the issuance of duty-free certificates. Such notice must be in writing, and shall identify
    - (i) the foreign supplies,
    - (ii) the country of origin,
    - (iii) the prime contract number, and
    - (iv) the scheduled delivery dates.
- ii. to see to it that all shipping documents are submitted **in the form specified in the clause, and**
- iii. **to instruct** his foreign suppliers as to the proper markings, bills of lading, and forms of consignment to be placed on supplies.

b. on its part, the **Government agrees**

- i. to execute the duty-free certificates
- ii. to give the Contractor assistance, if he so desires, in obtaining duty-free entry of properly documented supplies.

c. The Contractor

- i. **warrants** that all supplies claimed for duty-free entry are **intended** to be
  - a. delivered to the Government, or
  - b. incorporated in end-items to be delivered.
- ii. agrees to pay duty to the extent that any duty-free supplies (if not scrap or salvage) are **diverted** to nongovernmental use (unless sold under the direction of or with approval of the Contracting Officer).

Flow Down

Required under both clauses

1. When the ''Duty-free Entry for certain Specified Items'' clause is used, the Contractor agrees to include the substance of that clause in each subcontract, **at any level**, where the Subcontractor will be importing the items specified on the schedule as duty-free.
2. When the ''Notice of Imports — Possible Duty Free Entry'' clause is used in the contract, the Contractor must insert the substance of that clause in any **first-tier** subcontract under which imports of foreign supplies in excess of $10,000 may occur.

Special Notes

1. It is not likely that supplies imported under a research or development contract will qualify for duty-free entry as the authorizing laws cover only
   - a. emergency purchases of war materials, and

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I-3 DUTY-FREE ENTRY — CANADIAN SUPPLIES (1971 FEB)

(a) Except as otherwise approved by the Contracting Officer, no amount is or will be included in the contract price on account of duty with respect to —

(i) all end items which constitute ''Canadian end products'' (as defined in paragraph 6-101 of the Armed Services Procurement Regulation) to be delivered under this contract; and

(ii) all supplies (including, without limitation, raw materials, components and intermediate assemblies) produced or made in Canada which are to be incorporated in the end items to be delivered under this contract; **provided**, that such end items are made in the United States or Canada;

except supplies imported into the United States prior to the date of this contract, or, in the case of supplies imported by a first — or lower-tier Subcontractor hereunder, prior to the date of his subcontract.

(b) The Contractor warrants that all such Canadian supplies, for which such duty-free entry is to be claimed, are intended to be delivered to the Government or incorporated in the end items to be delivered under this contract, and that duty shall be paid by the Contractor to the extent that such supplies, or any portion thereof, (if not scrap or salvage), are diverted to nongovernmental use other than as a result of a competitive sale made, directed or authorized by the Contracting Officer.

(c) The Government agrees to execute duty-free entry certificates and to afford such assistance as appropriate in order to obtain the duty-free entry of Canadian end products or supplies as to which the shipping documents bear the notation specified in paragraph (d) below, except as the Contractor may otherwise agree.

(d) All shipping documents submitted to Customs, covering such Canadian end products or supplies for which duty-free entry is to be claimed, shall bear the following information:

(i) Government prime contract number;

(ii) identification of carrier;

(iii) the notation: ''UNITED STATES DEPARTMENT OF DEFENSE DUTY-FREE ENTRY TO BE CLAIMED pursuant to Schedule 8, Part 3, Item No. 832.00, Tariff Schedules of the United States. Upon arrival of shipment at port of entry, District Director of customs, kindly release the shipments under 8.59CP and notify the Director, Defense Contract Administration Services Region, Detroit, 1580 E. Grand Blvd., Detroit, Michigan 48211, who will execute Customs Forms 7501 and 7501A and the Duty-Free Entry Certificate.''

(iv) gross weight in pounds (if freight is based on space tonnage, state cubic feet in addition to gross shipping weight); and

(iv) estimated value in United States dollars.

(e) The Contractor agrees to instruct the foreign supplier to prepare a sufficient number of copies of the bill of lading (or other shipping document) so that at least two of the copies accompanying the shipment will be available for use by the District Director of customs at the port of entry.

(f) The Contractor agrees to notify the Contract Administration Office (CAO) in writing of any purchase by the Contractor of Canadian supplies that are to be imported into the United states for delivery to the Government or for incorporation in end items to be delivered to the Government under the contract. Such notice shall be furnished to the CAO immediately upon the award by the Contractor to the Canadian supplier. The notice shall identify (i) the Canadian supplies, (ii) the contract number, and (iii) the scheduled delivery date(s).

(g) This clause shall not apply to purchases of Canadian supplies in connection with this contract if (i) such Canadian supplies are identical in nature with supplies purchased by the Contractor or any Subcontractor hereunder in connection with his commercial business, and (ii) it is not economical or feasible to account for such supplies so as to assure that the amount of such supplies for which duty-free entry is claimed pursuant to this clause does not exceed the amount thereof purchased in connection with this contract.

(h) The Contractor agrees to insert the substance of this clause, including this paragraph (h), in all subcontracts for supplies hereunder that exceed $2,500. Each such subcontract shall require the Subcontractor to identify this contract by its contract number on any shipping documents submitted to Customs covering supplies for which duty-free entry is to be claimed pursuant to this clause.

b. purchases of consumable supplies for vessels or aircraft J-2

2. The requirements of the clause ''Notice of Imports — Possible Duty-Free Entry'' do not apply to purchases of foreign supplies when it is not economical to prevent their diversion to the Contractor's normal commercial uses.
3. The Contracting Officer is empowered to authorize the inclusion in the allowable cost of duty paid on items that could have been imported duty-free, but were not.

DUTY FREE ENTRY OF LISTED CANADIAN SUPPLIES J-3

Reference

ASPR 7-403.18 incorporates 7-104.32 (1971 FEB) in accordance with 6-605.

Source of Clause

Regulation. See also, Schedule 8, Part 3, item no. 832.00, Tariff Schedules of the United States.

Purpose of Clause

To enhance economic cooperation with Canada in the interests of North American defense, by giving duty-free entry to Canadian end products and Canadian supplies used in the United States or Canada.

Comment

1. **Applicability**

   This clause is required in every contract that

   a. is in excess of $2,500, except for construction contracts, **AND**

   b. includes the procurement of certain Canadian supplies listed by the concerned military department as being either

      i. of a military nature, or

      ii. involved in programs of mutual interest to the United States and Canada.

2. **Duty not an allowable cost**

   Duty with respect to either

   a. ''Canadian end products,'' which are defined as either

      i. unmanufactured end products mined or produced in Canada, or

      ii. manufactured end products, made in Canada, where the **cost** of components (including transportation costs to the place of manufacture) mined, manufactured, or produced in Canada or the United States, exceeds 50% of the **cost** of all its components.

   OR

   b. supplies (including raw materials, components, and intermediate assemblies) produced or made in Canada, which are to be incorporated into end items

      i. to be delivered under the contract, and

      ii. made in the United States or Canada.

3. **The Contractor must**

   a. **notify** the Contract Administration Office (CAO), **in writing,** whenever it purchases Canadian end products and/or supplies

   b. furnish such notice to the CAO immediately upon placing the order with the Canadian supplier, **AND**

   c. identify

      i. the Canadian supplies

      ii. the contract number

      iii. the scheduled delivery date(s).

      in such notice.

   d. see to it that all shipping documents are submitted to customs **in the form specified in the clause,** and

J-3

J-4 GENERAL SERVICES ADMINISTRATION SUPPLY SOURCES (1965 JAN)

The Contracting Officer may issue the Contractor an authorization to utilize General Services Administration supply sources for property to be used in the performance of this contract. All property acquired under such an authorization shall be subject to the provisions of the clause of this contract entitled ''Government Property,'' except paragraphs (a) and (b) thereof.

e. instruct his Canadian suppliers as to the proper markings, bills of lading, and forms of consignment to be placed on supplies. J-3

4. On its part, the **Government agrees**
   a. to execute the duty-free certificates
   b. to give the Contractor assistance, if he so desires, in obtaining duty-free entry of properly documented supplies.
5. The Contractor
   a. **warrants** that all Canadian supplies claimed for duty-free entry are **intended** to be
      i. delivered to the Government, or
      ii. incorporated in end-items to be delivered
   b. agrees to **pay duty** to the extent that any duty-free supplies (if not scrap or salvage) are **diverted** to nongovernmental use (unless sold under the direction of or with the approval of the Contracting Officer).

Flow Down

Required in all subcontracts exceeding $2,500, at any tier.

Special Notes

1. This clause does not apply to Canadian goods
   a. imported before the date of the contract as a subcontract, as appropriate **OR**
   b. where it would not be economical to prevent diversion of such goods to the Contractor's normal commercial uses.
2. The Contracting Officer is empowered to authorize the inclusion of allowable cost of duty paid on items that could have been imported duty-free, but were not.
3. Even though parts and equipment are **not** separately identified on various Departmental lists, such are **considered** to be included in such lists when purchased under a contract calling for such listed supplies.

GENERAL SERVICES ADMINISTRATION SUPPLY SOURCES J-4

References

ASPR 7-403.23 incorporates 7-204.28 (1965 JAN) in accordance with 5-907
FPR 1-7.203-13 in accordance with 1-5.9

Source of Clause

Regulation

Purpose of Clause

To promote greater economy and efficiency in Government procurement by making Government Services Administration (GSA) supply sources available to Contractors.

Comment

1. **Applicability**

   This clause is to be used in cost-reimbursement type contracts under which the Contractor may acquire supplies for the account of the Government.
2. **Authorizing the Use of G.S.A. Supply Sources**

   The Contracting Officer may authorize the Contractor to use G.S.A. supply sources in obtaining property to be used in work under the contract.

   a. **The Contracting Officer's decision to authorize**

   In determining whether to issue an authorization, the Contracting Officer must consider
      i. the administrative costs of ordering supplies from Government sources

J-4

J-5 GOVERNMENT PROPERTY

(a) **Government furnished property.** (1) The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(2) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described elsewhere in this contract, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (such property to be referred to as ''Government furnished property'').

In the event that Government furnished property is not delivered to the Contractor by such time or times as stated, or if not stated, in sufficient time to enable the Contractor to meet such delivery or performance dates under this contract, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay occasioned the Contractor and make appropriate equitable adjustments to any contractual provisions affected by any such delay in accordance with the provisions of the clause of this contract entitled ''Changes.''

In the event that Government furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, immediately upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer either (i) return or otherwise dispose of such property, or (ii) effect repairs or modifications thereto. Upon completion of (i) or (ii) above, the Contracting Officer, upon timely written request of the Contractor, shall make appropriate equitable adjustments to any contractual provisions affected thereby in accordance

   - ii. the comparative cost of purchased items
   - iii. delivery factors such as cost and time
   - iv. the Contractor's recommendations.
- b. **Authorization Conditions**
   - i. **title** to all property which the Contractor acquires by the authorization vests in the Government
   - ii. all property acquired by the Contractor under the authorization is **subject to** the ''Government Property'' clause (except for paragraphs (a) and (b) — those dealing with late or unacceptable delivery and decrease or substitutions).
   - iii. all such acquired property must be **used solely** for work under the particular contract involved.
   - iv. the agency may add other conditions deemed necessary in the public interest.

3. **The Contracting Officer's Duties**
   - a. **His authorization must**
      - i. cite the contract number
      - ii. specify the conditions for ordering
         - (a) G.S.A. stores stock
         - (b) under federal supply schedule contracts (required only by ASPR).
      - iii. state the expiration date of the authorization.
      - iv. specify that the authorization is not transferable or assignable (required only by ASPR).
   - b. **He should furnish information** regarding G.S.A. supply sources, including
      - i. federal supply schedules
      - ii. G.S.A. stores stock catalogues (both are usually available at the G.S.A. regional office).
4. **Purchasing by the Contractor**
   - a. **its purchasing order** must be in accordance with
      - i. the authorization, and
      - ii. the applicable federal supply schedule or G.S.A. format.
   - b. **Payment** should be made promptly upon receipt of a bill

Flow Down

Not required. The FPR (1-5.902) allows authorization of Subcontractors to use G.S.A. supply services. Such authorizations, however, must be issued through, and subject to the approval of, the prime Contractor.

Special Notes

Under the ASPR, the Contractor may not use G.S.A. supply sources to lease equipment, **except** that Government-owned facilities or automatic data processing equipment may be leased **if** the **entire** rental cost will be charged to cost-reimbursement contracts.

GOVERNMENT PROPERTY

J-5

Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation.

Purpose of Clause

To specify the rights which both the Government and the Contractor have concerning property to be used in the performance of the contract.

Comment

1. **Government Property**

J-5 with the provisions of the clause of this contract entitled ''Changes.'' The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government furnished property or delivery of such property in a condition not suitable for its intended use.

(b) **Title** (For title provision applicable to contracts for scientific research see paragraph (h) below).

(1) Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the Contractor, the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract; or (iii) reimbursement of the cost thereof by the Government in whole or in part, whichever first occurs. All Government furnished property, together with all property acquired by the Contractor, title to which vests in the Government under this paragraph are subject to the provisions of this clause and are hereinafter collectively referred to as ''Government property.''

(2) Title to the Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity or personality by reason of affixation to any realty.

(c) **Use of Government property.** Government property shall, unless otherwise provided herein or approved by the Contracting Officer, be used only for the performance of this contract.

(d) **Property management and control.** The Contractor shall maintain and administer in accordance with sound business practice a program for the maintenance, repair, protection, and preservation, control of and accountability for Government property, so as to assure its full availability and usefulness for the performance of this contract. The Contractor agrees to promptly receipt for all Government property in a form and manner as prescribed by the Contracting Officer The Contractor further agrees to take all reasonable steps to comply with all directions or instructions which the Contracting Officer may prescribe regarding the management and control of Government property.

(e) **Risk or loss.** The Contractor shall not be liable for any loss of or damage to Government property, or for expenses incidental to such loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto):

(i) Which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives, who have supervision or direction of (A) all or substantially all of the Contractor's operations at any one plant, laboratory or separate location in which this contract is being performed or (B) a separate and complete major organization, industrial or otherwise, in connection with the performance of this contract:

(ii) Which results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of any of its directors, officers or other representatives mentioned in subparagraph (i) above, (A) to maintain and administer, in accordance with sound business practice, the program for maintenance, repair, protection, and preservation of Government property as required by paragraph (d) hereof, or (B) to take all reasonable steps to comply with any appropriate written directions of the Contracting Officer under paragraph (4) hereof;

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) Which results from a risk expressly required to be insured under this contract, but only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater; or

(v) Which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement: **Provided,** That, if more than one of the above exceptions shall be applicable in any case, the Contractor's liability under any one exception shall not be limited by any other exception.

(2) If the Contractor transfers Government property to the possession and control of a Subcontractor the transfer shall not affect the liability of the Contractor for loss or destruction of or damage to Government property as set forth in (1) above. The Contractor shall require the Subcontractor to assume the risk of and be responsible for any loss or destruction of or damage to Government property while in the latter's possession, or control, and the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received (except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of this contract). **Provided, however,** That the Subcontractor may be relieved from such liability only to the extent that the subcontract, with the prior approval of the Contracting Officer, so provides.

(3) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance, or any provisions for a reserve, covering the risk of loss of or damage to the Government property, except to the extent that the Government may have required the Contractor to carry such insurance under any other provision of this contract.

(4) Upon the happening of loss or destruction of or damage to the Government property, the Contractor shall notify the Contracting Officer thereof, and shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best order, and furnish to the Contracting Officer a statement of:

a. The Government will have **title** to
i. all Government-furnished property, and
ii. all property acquired by the Contractor which is **expressly** stated in the contract to be Government property.

b. Government property may be used **only** in the performance of this contract, **unless**
i. the contract provides otherwise or
ii. the Contracting Officer approves other uses.

c. Government property remains Government property regardless of any other property
i. attached to it, or
ii. incorporated into it.

2. **Government-furnished** property

a. the Government has the right to furnish **any** property (or services) required to perform the contract
b. the Government must provide the Contractor with the data or information needed to properly use such property

IF

c. Government-furnished property is not delivered in a condition suitable for its intended use

THEN

the Contractor shall
i. immediately upon receipt notify the Contracting Officer and
ii. as directed by him, modify, repair, return, or dispose of such property.

IF

d. Government-furnished property is not delivered
i. a. by the stated time, or, if none is stated
b. in time for the Contractor to meet delivery and performance dates **or**
ii. in a suitable condition.

THEN

as its **exclusive remedy,** the Contractor may make a timely **written** request to the Contracting Officer, who shall make **equitable adjustments** in accordance with the ''Changes'' clause.

3. **Government property management and control**

a. Reporting. The Contractor must, in such form and manner as the Contracting Officer may prescribe,
i. promptly give receipt for Government property.
ii. regularly report on the status of all Government property in the Contractor's possession, **noting unused or excess property.**
iii. upon completion (or at any earlier date fixed by the Contracting Officer) render a final accounting of all Government property which has come into the Contractor's possession, including an inventory schedule of all Government property for which the Contractor retains responsibility.

b. To assure the usefulness of Government property in performing this contract, the Contractor shall
i. implement a sound program of maintenance, repair, protection and control of Government property.
ii. follow any further instructions of the Contracting Officer.

c. The Contractor shall not be relieved of responsibility for Government property except on the **prior written** approval of the Contracting Officer.

d. The Contracting Officer may at any time (including contract completion or expiration) direct the Contractor,
i. to dispose of Government property in such manner as he instructs.
ii. as to the use of any proceeds of such disposition.

4. **Liability for loss or damage**

a. The general rule: the Contractor is **not liable** for loss or damage to Gvernment property, or related expenses.

b. **Exceptions:** the Contractor **is responsible** for loss or damage
i. due to the **willful misconduct** or lack of good faith of the Contractor or his responsible representatives

(i) The lost, destroyed, and damaged Government property;

(ii) The time and origin of the loss, destruction or damage;

(iii) all known interest in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

The Contractor shall make repairs and renovations of the damaged Government property or take such other actions as the Contracting Officer directs.

(5) In the event the Contractor is indemnified, reimbursed, or otherwise compensated for any loss or destruction of or damage to the Government property, it shall use the proceeds to repair, renovate, or replace the Government property involved, or shall credit such proceeds against the cost of the work covered by the contract, or shall otherwise reimburse the Government, as directed by the Contracting Officer. The Contractor shall do nothing to prejudice the Government's right to recover against third parties for any such loss, destruction or damage and, upon the request of the Contracting Officer shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including assistance in the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a Subcontractor has not been relieved from liability for any loss or destruction of or damage to Government property, the Contractor shall enforce the liability of the Subcontractor for such loss or destruction of or damage to the Government property for the benefit of the Government.

(f) **Disposition of Government property.** (1) During the period of performance of this contract, the Contractor shall promptly and regularly report to the Contracting Officer, in such form and manner as the Contracting Officer may direct, concerning the status of Government property under the contract, incuding all Government property in the Contractor's possession which is not in use or which is excess to the needs of the contract. The Contractor shall make such disposition of Government property as the Contracting Officer may direct. The Contractor shall in no way be relieved of responsibility for Government property without the prior written approval of the Contracting Officer.

(2) Upon completion or expiration of this contract, or at such earlier date as may be fixed by the Contracting Officer, the Contractor shall render an accounting as prescribed by the Contracting Officer, of all Government property which had come into the possession or custody of the Contractor under this contract. Such accounting shall include inventory schedules covering all items of Government property not consumed in the performance of this contract, or not theretofore delivered to the Government, or for which the Contractor has not otherwise been relieved of responsibility. The Contractor shall deliver or make such other disposition of Government property covered in such inventory schedules as the Contracting Officer may direct.

(3) The net proceeds of any disposition of Government property, in accordance with (1) and (2) above, shall be credited to the cost of the work covered by the contract or shall be paid in such manner as the Contracting Officer may direct.

(g) **Restoration of premises.** Unless otherwise provided herein, the Government shall not be under any duty or obligation to restore or rehabilitate, or to pay the costs of the restoration or rehabilitation of the Contractor's facility or any portion thereof which is affected by removal of any Government property.

(h) **Title to property under contracts with educational institutions for scientific research.** If this is a contract with a nonprofit educational institution for scientific research, as determined by the Contracting Officer elsewhere in this contract, the following title provision shall replace paragraph (b) above and the following is added to paragraph (d),

Title

(i) Title to all Government-furnished property shall remain in the Government.

(ii) Except as otherwise expressly provided elsewhere in this contract, title to all material, supplies and equipment purchased or otherwise acquired by the Contractor, for the cost of which the Contractor is to be reimbursed as a direct item of cost, shall be and remain in the Contractor subject to the provisions of subparagraph (iii) below: **Provided, however,** That the Contractor shall not, under any Government contract or subcontract thereunder or, under any Government grant, charge for any depreciation, amortization, or use of any property title to which remain in the Contractor pursuant to this subparagraph. The Contractor agrees to use such materials, supplies, and equipment for the benefit of research under this contract and any extension or successor contracts thereto and to continue to use such property for the benefit of research of interest to the Government.

(iii) With respect to items of equipment having an acquisition cost of $1,000 or more, title to which vests in the Contractor pursuant to subparagraph (ii) above, the Contractor agrees:

(A) To report such items to the Contracting Officer from time to time as they are acquired and to maintain a control system which will permit their ready identification and location; and

(B) To transfer title to any such items to the Government or to a third party designated by the Government, when third party is eligible under existing statutes, in accordance with any written request therefor issued by the Contracting Officer at any time prior to final payment under this contract.

(iv) All Government-furnished property, together with all property acquired by the Contractor, title to which vests in the Government pursuant to any other express provision of this contract, is subject to the provisions of this clause and is hereinafter collectively referred to as ''Government property.'' Title to the Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity or personality by reason of affixation to any realty.

(a) in connection with the performance of the contract.
(b) in failing to comply with
  (i) the maintenance requirements.
  (ii) written directions of the Contracting Officer to prevent further loss or damage.
ii. **as expressly provided** in the contract.
iii. due to a **risk expressly required** to be **insured** against, **but** only to the extent of
  (a) the insurance required, or
  (b) the insurance actually held, whichever is greater.
iv. to the extent the Contractor is actually reimbursed, by insurance or otherwise.

The Contractor's liability under one exception shall not be limited by that under another exception.

5. **Loss or destruction to Government property**

IF

loss or destruction to Government property occurs

THEN

a. the Contractor must
  i. notify the Contracting Officer of and provide a statement of
    (a) the property lost or damaged
    (b) the time and origin of such loss or damage
    (c) all known interests commingled in the property
    (d) the insurance coverage
  ii. take all reasonable steps to prevent further damage.
  iii. separate damaged and undamaged property
  iv. put all Government property in the best order, **AND**
  v. make repairs, renovations or such other actions as the Contracting Officer may direct

AND IF

b. The Contractor is covered for such loss or damage

THEN

he shall use the proceeds of such coverage, either
  i. to repair, renovate or replace such property, or
  ii. to reimburse the Government, by credit or otherwise as directed by the Contracting Officer.

AND IF

c. the Government seeks to recover against a third party

THEN

the Contractor shall
  i. furnish reasonable assistance in such efforts, when requested, but at the Government's expense.
  ii. do nothing to prejudice the Government's attempts to recover.

Contractor Acquired Property

1. The Contractor shall retain title to all materials, supplies and equipment
  a. purchased or acquired by him
  b. which may be reimbursed as a direct cost, and
  c. which are **not** expressly designated as Government property
2. The Contractor shall **not** charge for any depreciation, amortization or use of such property under any
  a. Government contract or subcontract thereunder, or
  b. Government grant

IF

3. the equipment costs $1,000 or more,

THEN

the Contractor shall
  a. **report** its acquisition to the Contracting Officer

J-5 (d) Whether or not title to property is vested in the Contractor, the Contractor is responsible for maintaining property acquired from contract funds available for the performance of the contract except for property which through normal use becomes unserviceable and uneconomically repairable.

J-6 GOVERNMENT PROPERTY (COST-REIMBURSEMENT, NONPROFIT) (1972 SEP)

(a) **Government-furnished Property.** The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described as Government-furnished property in this contract, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as ''Government-furnished property''). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished property suitable for use will be delivered to the Contractor at the times stated in the Schedule of this contract or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay, if any, occasioned the Contractor and shall equitably adjust the estimated cost, or delivery or performance dates, or both, and any other contractual provisions affected by any such delay. In the event that the Government-furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property, or (ii) effect repairs or modifications. Upon completion of (i) or (ii) above, the Contracting Officer upon timely written request of the Contractor shall equitably adjust the estimated cost, or delivery or performance dates, or both and any other contractual provision affected by the return, disposition, repair or

- b. maintain a **control system** to identify and locate each such item J-5
- c. upon a **written request** by the Contracting Officer issued **prior to final payment,** transfer title to
  - i. the Government, or
  - ii. authorized third parties (see Special Note)

4. The Contractor shall
   - a. use such property for the benefit of research
     - i. under the contract or successor contracts.
     - ii. of interest to the Government.
   - b. maintain such property, unless it becomes useless through normal wear and tear.
   - c. bear the risk of loss or damage to such property

Flow Down

Not required. When the Contractor transfers Government property to a Subcontractor, he will **continue to be liable** as if he still held the property himself.

Moreover, the Contractor must

1. **require the Subcontractor**
   - a. **to assume responsibility** for any loss, damage or destruction to Government property while it is in his possession.
   - b. **to return** all Government property in as good a condition (except for normal wear and tear) as when received.
2. **enforce the Subcontractor's liability** if loss, destruction or damage occurs to Government property while he is liable

   BUT

   the Subcontractor may be relieved from such liability **IF** the Subcontractor — with the Contracting Officer 's prior approval — so provides

Special Notes

1. The **Government is not liable** for damage to the Contractor 's property caused by the removal of Government property from the Contractor 's facility, **unless** the contract specifically provides otherwise
2. Agencies authorized to make contracts or grants for the conduct of basic or applied scientific research may vest title to equipment purchased with contract or grant funds in
   - a. nonprofit institutions of higher education, or
   - b. nonprofit organizations whose primary purpose is the conduct of scientific research

   (42 U.S.C. §1892 (1970), 72 Stat. §1793 (1958))

   Title to such property may be free and clear or subject to such terms and conditions as the agency deems appropriate.

GOVERNMENT PROPERTY (COST REIMBURSEMENT, NONPROFIT) J-6

References

ASPR 7-402.25 (1972 SEP)
FPR 1-7.203-21(a)

Source of Clause

Regulation

Purpose of Clause

To specify the rights and duties which both the Government and the Contractor have concerning property to be used in the performance of the contract.

modification. The foregoing provisions for adjustment are exclusive and the Government shall not be liable for suit for breach of contract by reason of any delay in delivery of Government-furnished property or delivery of such property in a condition not suitable for its intended use.

(b) **Changes in Government-furnished Property**

(1) By notice in writing, the Contracting Officer may (i) decrease the property furnished or to be furnished by the Government under this contract, or (ii) substitute other Government-owned property for property to be furnished by the Government, or to be acquired by the Contractor for the Government, under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct with respect to the removal, shipping, and disposal of property covered by such notice.

(2) In the event of any decrease in or substitution of property pursuant to subparagraph (1) above, or any withdrawal of authority to use property provided under any other contract or lease, which property the Government had agreed in the Schedule to make available for the performance of this contract, the Contracting Officer, upon the written request of the Contractor (or if the substitution of property causes a decrease in the cost of performance, on his own initiative), shall equitably adjust such contractual provisions as may be affected by the decrease, substitution or withdrawal, in accordance with the procedures provided for in the ''Changes'' clause of this contract.

(c) **Title**

(1) Title to all property furnished by the Government shall remain in the Government.

(2) Notwithstanding subparagraph (1) above, title to equipment purchased with funds available for research having an acquisition cost of less than $1,000 shall vest in the Contractor upon acquisition or as soon thereafter as feasible provided that the Contractor shall have obtained approval of the Contracting Officer prior to acquisition of such property.

(3) Title to equipment having an acquisition cost of $1,000 or more, purchased with funds available for the conduct of research, shall vest as set forth in the contract.

(4) If title to equipment is vested pursuant to (2) or (3) above, the Contractor agrees that no charge will be made to the Government for any depreciation, amortization, or use charge with respect to such equipment under any existing or future Government contract or subcontract thereunder.

(5) The Contractor shall furnish the Contracting Officer a list of all equipment acquired under subparagraph (2) above within ten (10) days following the end of the calendar quarter during which such equipment was received.

(6) All Government furnished property, together with all property acquired by the Contractor, title to which vests in the Government under this clause, is hereinafter collectively referred to as ''Government property.''

(7) Title to Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity or personalty by reason of affixation to any realty.

(8) Title to all property purchased by the Contractor, for the cost of which the Contractor is to be reimbursed as a direct item of cost under this contract and which under the provisions of this contract is to vest in the Government, shall pass to and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is to be reimbursed to the Contractor under this contract and which under the provisions of this contract is to vest in the Government, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement or processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, whichever first occurs.

(d) **Property Administration.** The Contractor shall comply with the provisions of Appendix C, Armed Services Procurement Regulation, as in effect on the date of the contract, which is hereby incorporated by reference and made a part of this contract. Material to be furnished by the Government shall be ordered or returned by the Contractor, when required, in accordance with the ''Manual for Military Standard Requisitioning and Issue Procedure (MILSTRIP) for Defense Contractors'' (Appendix H, Armed Services Procurement Regulation) as in effect on the date of this contract, which Manual is hereby incorporated by reference and made a part of this contract.

(e) **Use of Government Property.** The Government property shall, unless otherwise provided herein or approved by the Contracting Officer, be used only for the performance of this contract.

(f) **Utilization, Maintenance and Repair of Government Property.** The Contractor shall maintain and administer, in accordance with sound business practice, and in accordance with applicable provisions of Appendix C, a program for the utilization, maintenance, repair, protection and preservation of Government property so as to assure its full availability and usefulness for the performance of this contract. The Contractor shall take all reasonable steps to comply with all appropriate directions or instructions which the Contracting Officer may prescribe as reasonably necessary for the protection of the Government property.

(g) **Risk of Loss.**

(1) The Contractor shall not be liable for any loss of or damage to the Government property, or for expenses incidental to such loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto):

(i) which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of all or substantially all of the Contractor's

Comment

1. Government Property

a. Government property is
i. All Government furnished property, and
ii. All property acquired by the Contractor, title to which vests in the Government under the clause.

b. Government property may be used **only** for the performance of **this** contract **unless**
i. The contract provides otherwise, or
ii. The Contracting Officer approves other uses.

c. Government property remains Government property regardless of whether it is
i. Incorporated into any other property, or
ii. Attached to any other property.

2. Government-furnished Property

a. The Government must deliver to the Contractor
i. The property **described in the contract** as Government-furnished property and
ii. The data and information needed for the intended use of the property — such use to be
(a) In connection with, and
(b) Under the terms of the contract.

b. Delivery assumptions and adjustments
i. The Contractor's due date is based on the assumption that Government-furnished property suitable for use will be delivered to the Contractor
(a) At the times stated in the contract schedule, or (if not so stated)
(b) In sufficient time for the Contractor to meet its due date.

IF
ii. the Government-furnished property is not delivered in a condition suitable for its intended use,
THEN
the Contractor shall
(a) Upon receipt, notify the Contracting Officer, and
(b) As directed by him, return such property or make the necessary repairs and modifications

IF
iii. Government-furnished property is not delivered
(a) By the stated time **or** (if no time is stated) in time for the Contractor to meet its due date, **OR**
(b) In a suitable condition
THEN
The Contractor, as its exclusive remedy, may make a timely **written** request to the Contracting Officer, who shall make **equitable adjustments** in
(a) The estimated cost of the contract, or
(b) The Contractor's due date, or
(c) Any other contract provisions affected.

c. Changes in Government-furnished property
i. The Contracting Officer, **by written notice,** may
(a) **Decrease** the property furnished or to be furnished by the Government under this contract, or
(b) **Substitute** other Government-owned property for property **to be furnished** by the Government, or acquired by the Contractor for the Government under the contract.
ii. The Contractor must promptly take such action as the Contracting Officer may direct with respect to the
(a) Removal
(b) Shipping, and
(c) Disposal of property covered by the Contracting Officer's written notice.
iii. Adjustments
IF
(a) Government-furnished property is decreased or substituted-for, or

business, or all or substantially all of the Contractor's operations at any one plant, laboratory, or separate location in which this contract is being performed;

(ii) which results from a failure on the part of the Contractor, due to the willful misconduct or lack of good faith on the part of any of his directors, officers or other representatives mentioned in (i) above, (A) to maintain and administer, in accordance with sound business practice, the program for utilization, maintenance, repair, protection and preservation of Government property as required by (f) above, or to take all reasonable steps to comply with any appropriate written directions of the Contracting Officer under (f) above, or (B) to establish, maintain and administer, in accordance with (d) above, a system for control of Government property;

(iii) for which the Contractor is otherwise responsible under the express terms of the clause or clauses designated in the schedule;

(iv) which results from a risk expressly required to be insured under some other provisions of this contract, but only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater; or

(v) which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement.

Any failure of the Contractor to act as provided in subparagraph (ii) above, shall be conclusively presumed to be a failure resulting from willful misconduct, or lack of good faith on the part of such directors, officers, or other representatives mentioned in subparagraph (i) above, if the Contractor is notified by the Contracting Officer by registered or certified mail, addressed to one of such directors, officers, or other representatives, of the Government's disapproval, withdrawal of approval, or nonacceptance of the Contractor's program or system. In such event, it shall be presumed that any loss of or damage to Government property resulted from such failure. The Contractor shall be liable for such loss or damage unless he can establish by clear and convincing evidence that such loss or damage did not result from his failure to maintain an approved pregram or system or occurred during such time as an approved program or system for control of Government property was maintained.

If more than one of the above exceptions shall be applicable in any case, the Contractor's liability under any one exception shall not be limited by any other exception.

(2) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance, or any provision for a reserve, covering the risk of loss of or damage to the Government property, except to the extent that the Government may have required the Contractor to carry such insurance under any other provision of this contract.

(3) Upon the happening of loss or destruction of or damage to the Government property, the Contractor shall notify the Contracting Officer thereof, and shall communicate with the Loss and Salvage Organization, if any, now or hereafter designated by the Contracting Officer, and with the assistance of the Loss and Salvage Organization so designated (unless the Contracting Officer has designated that no such organization be employed), shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best possible order, and furnish to the Contracting Officer a statement of:

(i) the lost, destroyed, and damaged Government property;

(ii) the time and origin of the loss, destruction, or damage;

(iii) all known interests in commingled property of which the Government property is a part; and

(iv) the insurance, if any, covering any part of or interest in such commingled property.

The Contractor shall make repairs and renovations of the damaged Government property or take such other action as the Contracting Officer directs.

(4) In the event the Contractor is indemnified, reimbursed, or otherwise compensated for any loss or destruction of or damage to the Government property, he shall use the proceeds to repair, renovate or replace the Government property involved, or shall credit such proceeds against the cost of the work covered by the contract, or shall otherwise reimburse the Government, as directed by the Contracting Officer. The Contractor shall do nothing to prejudice the Government's right to recover against third parties for any such loss, destruction or damage, and upon the request of the Contracting Officer, shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including assistance in the prosecution of suit and the execution of instruments of assignment is favor of the Government) in obtaining recovery.

*(5) If this contract is for the development, production, modification, maintenance or overhaul of aircraft, or otherwise involves the furnishing of aircraft by the Government, the clause of this contract entitled ''Flight Risks'' shall control, to the extent it is applicable, in the case of loss or destruction of, or damage to, aircraft. **(*This subparagraph may be omitted where it is clearly inapplicable.)**

(h) **Access.** The Government, and any persons designated by it, shall at all reasonable times have access to the premises wherein any of the Government property is located, for the purpose of inspecting the Government property.

(i) **Disposition of Government Property.** Upon completion or expiration of this contract, or at such earlier dates as may be fixed by the Contracting Officer, any Government property which has not been consumed in the performance of this contract, or which has not been disposed of as provided for elsewhere in this clause, or for which the Contractor has not otherwise been relieved of responsibility, shall be disposed of in the same manner, and subject to the same

(b) The Government withdraws its previously given approval to use property provided under any other contract or lease

THEN

The Contracting Officer may

(a) Upon the written request of the Contractor, or

(b) On his own initiative (i.e. when the decrease, substitution or withdrawal causes a decrease in

3. Title to Property
   - a. Title to all property furnished by the Government shall remain in the Government
   - b. Title to property purchased by the Contractor.

     IF

     i. The cost of the property to the Contractor will be reimbursed **as a direct cost** under the contract **AND**

     ii. Title to the property, under the provisions of the contract, is to vest in the Government

     THEN

     Title passes to the Government when the property **is delivered to** the Contractor.

     IF

     i. The cost of the property to the Contractor will be reimbursed under the contract **AND**

     ii. Title to the property, under the provisions of the contract, is to vest in the Government

     THEN

     Title will pass to and vest in the Government upon

     i. The issuance of such property for use in contract performance,

     ii. The use of such property in contract performance, **OR**

     iii. Reimbursement for such property **whichever comes first.**
   - c. Title to equipment purchased with funds available for the conduct of research

     i. Title to equipment costing less than $1,000, the purchase of which has the **prior** approval of the Contracting Officer, vests in the Contractor

     (a) Upon acquisition, or

     (b) As soon thereafter as feasible.

     The Contractor must provide the Contracting Officer a list of all such equipment within 10 days of the end of the quarter year during which it was acquired.

     ii. Title to equipment costing $1,000 or more shall be as specifically set forth in the contract.

     iii. the Contractor agrees not to charge the Government any depreciation, amortization, or use charge under an

     (a) Existing or future Government contract **OR**

     (b) Subcontract thereunder with respect to any equipment title to which it was vested by this clause.

4. Control and Maintenance of Government Property
   - a. **Control System**

     The Contractor must establish and maintain a system to control, protect, preserve, and maintain all Government Property.

     i. **Under FPR, if** the Contracting Officer requests, **then** the Contractor's system

     (a) Must be submitted for review, and

     (b) If satisfactory, approved in writing by the Contracting Officer.

     ii. **Under ASPR,** the control system (which must comply with ASPR's Appendix C) must be in writing **unless** the ''Property Administrator'', an **authorized** representative of the Contracting Officer, determines that a written system is not necessary.
   - b. **Control Records**

     The Contractor should have adequate control records for Government Property in its or its Subcontractor's possession.

     i. **Under FPR,** The Contractor, **as directed by the Contracting Officer,** must clearly identify Government Property by marking, tagging, or segregating it.

     ii. **Under ASPR,** the Contractor

     (a) Must identify, mark, and record all Government Property upon receipt **unless,** with **special** procedures, as is provided in paragraph (g) of the clause of this contract entitled ''Termination for the Convenience of the Government'' with respect to termination inventory. The proceeds of any such disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract, or shall otherwise be credited to the cost of the work covered by this contract, or shall be paid in such other manner as the Contracting Officer may direct. Pending final disposition of such property, the Contractor agrees to take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation thereof.

(j) **Removal of Government Property and Abandonment.** If the Contractor determines any Government property to be in excess of his needs under this contract, such Government property shall be disposed of in the same manner as provided by paragraph (i) above, except that the Government may abandon any Government property in place and thereupon all obligations of the Government regarding such abandoned property shall cease. Unless otherwise provided herein, the Government has no obligation to the Contractor with regard to restoration or rehabilitation of the Contractor's premises, neither in case of abandonment, disposition pursuant to paragraph (i) above, nor otherwise, except for restoration or rehabilitation costs caused by removal of Government property pursuant to paragraph (b) above.

(k) **Communications.** All communications issued pursuant to this clause shall be in writing or in accordance with the ''Manual for Military Standard Requisitioning and Issue Procedure (MILSTRIP) for Defense Contractors'' (Appendix H, Armed Services Procurement Regulation).

test equipment, the marking will damage the equipment.

(b) Must give a receipt for the Government Property, when the Property Administrator determines such is necessary.

(c) Must have records.

  (i) Which are kept up to date and are readily ascertainable.

  (ii) Which are kept separately for each contract (but consolidated records will be allowed if they keep the required information).

  (iii) Which contain the unit price for each item of Government Property held.

(d) Must take an inventory of the Government Property in its possession

  (i) Periodically, **and**

  (ii) Upon termination or completion of the contract and a report of the inventory must be submitted to the Property Administrator.

c. **Maintenance Program**

The Contractor must maintain a program for the utilization, maintenance, repair, protection, and preservation of Government Property.

i. **Under FPR,** the program must be in accord with ''sound industrial practices''.

ii. **Under ASPR,**

  (a) The program must be in accord with

    (i) ''Sound Business Practices'', and

    (ii) ASPR, Appendix C.

  (b) Accordingly, the Contractor's maintenance program must provide for

    (i) Disclosing the need and performing preventive maintenance

    (ii) Reporting the need for major repairs, replacements, and rehabilitations (I.E. Capital improvements)

    (iii) Recording the maintenance work performed.

d. Protection

The Contractor must take all reasonable steps to comply with all appropriate directions and instructions which the Contracting Officer prescribes as necessary for protecting Government Property

e. Government Inspections

For the purpose of inspecting Government Property, the Government, **and any people** it designates, are to have access **at all reasonable times,** to any premises of the Contractor on which Government Property is located.

5. Liability for Loss or Damage

a. **The General Rule** — The Contractor is not liable for loss or damage to Government Property, or for related expenses.

b. **Exceptions** — The Contractor **is** responsible for loss or damage (and related expenses)

i. Due to the **willful misconduct** or lack of good faith of the Contractor or his responsible representatives

  (a) In connection with the performance of the contract.

  (b) In failing to comply with

    (i) The **maintenance program** required by the contract.

    (ii) The **control system** required by the contract, or

    (iii) Written directions of the Contracting Officer reasonably necessary to protect the Government property.

ii. As expressly provided in the contract.

iii. Due to a **risk expressly required** to be insured against, **but** only to the extent of

  (a) The insurance required, **OR**

  (b) The insurance actually held **whichever is greater.**

iv. To the extent the Contractor is actually reimbursed for the loss, by insurance or otherwise.

NOTE — The Contractor's liability under one exception shall **not** be limited by any other exception.

6. Loss or Destruction to Government Property

IF

loss, destruction, or damage occurs to Government Property

THEN

a. the Contractor must

i. Notify the Contracting Officer, providing a statement of

(a) The Government Property lost, destroyed, or damaged.

(b) The time and origin of such loss, destruction, or damage.

(c) All known interests commingled with Government Property.

(d) The insurance coverage on the property involved.

ii. communicate with the Loss and Salvage Organization (if one is designated by the Contracting Officer) **and** (with the organization's help or by itself if there is no such designated organization),

iii. Take all reasonable steps to prevent further damage to Government Property,

iv. Separate damaged and undamaged Government Property,

v. Put **all** the Government Property in the best possible order, and

vi. Make repairs, renovations, or take such other actions as the Contracting Officer may direct.

AND IF

b. the Contractor is covered for such loss, destruction. or damage to Government Property, **then** it shall use the proceeds of such coverage either

i. To repair, renovate, or replace such property, **OR**

ii. to reimburse the Government, by credit or otherwise as directed by the Contracting Officer.

AND IF

c. the Government seeks to recover against a third party, **then** the Contractor shall

i. Do nothing to prejudice the Government's attempts to recover.

ii. Furnish reasonable assistance in such efforts, when requested by the Contracting Officer, but at the Government's expense.

7. Disposition of Government Property

a. **Time of Disposition**

Government Property shall be disposed of

i. Upon completion, termination, or expiration of the contract **IF**

(a) It has not been consumed in the performance of the contract,

(b) It has not already been disposed of, or

(c) The Contractor has not previously been relieved of responsibility for the property.

ii. At such earlier dates as fixed by the Contracting Officer or the contract including — but **not limited to — under the ASPR** — when the Contractor determines under the contract that such property **exceeds its needs.**

b. **Method of Disposition**

i. Government Property shall be disposed of

(a) **Under the ASPR,** in the same manner as and subject to the same procedures which govern the disposition of ''Termination Inventory'' (as provided in paragraph (G) of the ''Termination for Convenience of the Government'' clause).

(b) **Under the FPR,** by the Contractor's

(i) First submitting — in a form acceptable to the Contracting Officer — **Inventory Schedules** covering all the items of Government Property which it still holds

(ii) And then disposing of the property according to the directions or authorizations of the Contracting Officer.

c. **Abandonment** by the Government

The Government may — unless otherwise provided — abandon any Government Property in place, and when it does, **all obligations** of the Government regarding the abandoned property **cease.**

d. **Proceeds** of the Disposition of Government Property

The proceeds of any proper disposition of Government Property shall

i. **Be applied to reduce any payments** to be made by the Government to the Contractor under the contract.

ii. **Be otherwise credited** to the cost of the work covered by the contract.

iii. Be paid in any other manner, as the Contracting Officer directs.

e. Government Liability for damage to the Contractor's property caused by Government Property

- i. **Unless otherwise provided** in the contract, the Government does not **have a duty** to the Contractor to restore or rehabilitate the Contractor's premises if damage to them is due to
  - (a) Abandonment of Government Property
  - (b) Disposition of Government Property, or
  - (c) Other cause.
- ii. **Basic Exception**
  - (a) Restoration or rehabilitation costs caused by the removal of Government Property when a ''change'' is made in Government Property will be considered in an equitable adjustment to be made under the procedures of the ''Changes'' clause
  - (b) Such a ''change'' is usually
    - (i) A **decrease** in the property furnished by the Government under the contract, or
    - (ii) A **withdrawal** of authority to use property provided by the Government.

Flow Down

Under the FPR, and the ASPR, when the Contractor transfers Government Property to a Subcontractor, it will **continue to be liable as if** it still held the property itself.

Under the FPR the Contractor must

- i. Require the Subcontractor
  - a. **To assume responsibility** for any loss, damage or destruction to Goverment Property while it is in its possession.

    However — the Subcontractor may be relieved from such liability **if** the subcontract — with the **Contracting Officer's prior approval** — so provides.
  - b. **To return** all Government Property in as good condition (except for normal wear and tear) as when received.
- ii. **Enforce the Subcontractor's Liability** if loss, destruction, or damage occurs to the Government Property while the Subcontractor is liable.

Under the ASPR, the Contractor

- i. Must hold the Subcontractor liable for any loss or damage to such property **or —**
- ii. In a **cost-reimbursement** type **subcontract under** a **cost-reimbursement** type **contract,** may with the prior approval of the Contracting Officer, hold the Subcontractor to the same kind of limited liability under which it holds Government Property.

Special Notes

IF

1. the Contracting Officer notifies the Contractor by registered or certified mail addressed to one of its responsible representatives that the Government rejects the Contractor's maintenance program or control system

   THEN

   Any loss of damage to Government Property occurring afterwards (until an approved program or system is instituted) shall be conclusively presumed to be due to the willful misconduct or the lack of good faith of the representatives.

   The Contractor will be liable **unless** it can establish by **clear and convincing** evidence that such loss

   - a. **Was not caused** by its failure to maintain an approved system or program **or**
   - b. **Occurred during a time** when an approved program or system **was** maintained.
2. **Communications**
   - a. **Under the FPR,** all communications issued pursuant to the ''Government Property'' clause must be **in writing.**
   - b. **Under the ASPR,** all communications issued pursuant to the ''Government Property'' clause must be
     - i. In writing, or
     - ii. In accordance with the ''Manual For Military Standard Requisitioning and Issue Procedure (MILSTRIP) for Defense Contractors'' (ASPR — Appendix H).
3. The Contractor may **not** include as an indirect cost nor be reimbursed for the costs of any insurance or

J-7 PREFERENCE FOR CERTAIN DOMESTIC COMMODITIES (1967 SEP).

The Contractor agrees that there will be delivered under this contract only such articles of food, clothing, cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric, coated synthetic fabric, or wool (whether in form of fiber or yarn or contained in fabrics, materials, or manufactured articles) as have been grown, reprocessed, reused, or produced in the United States, its possessions, or Puerto Rico; **provided**, that this clause shall have no effect to the extent that the Secretary has determined as to any such articles that a satisfactory quality and sufficient quantity cannot be procured as and when needed at United States market prices; **provided further**, that nothing herein shall preclude the delivery of foods under this contract which have been manufactured or processed in the United States, its possessions, or Puerto Rico.

(End of clause)

reserve provision covering the risk of loss or damage to Government Property **unless** the Government has—in the contract—required the Contractor to carry such insurance. J-6

4. **Under the ASPR**

a. The Contractor must **order or return** material to be furnished by the Government in accordance with MILSTRIP (Appendix H).

IF

b. a contract is for the development, production, modification, maintenance, or overhaul of aircraft or otherwise involves the furnishing of aircraft by the Government

THEN

a contract clause entitled ''Flight Risks''

i. Will be in the contract, and

ii. Will control, where applicable — in case of loss, destruction, or damage to the aircraft.

5. **Facilities Contracts** — ASPR Only

Property furnished by the Government under the ''Government Property'' clause is normally limited in use to the particular contract involved.

a. **Under a Facilities Contract,** however, the Government, for use in connection with the performance of another Government contract or contracts, can provide a Contractor with

i **Facilities** — industrial property for

(a). Production or maintenance

(b) Research or development, or

(c) Testing.

and, when administratively desirable,

ii **Special Tooling** — limited in application, or

iii **Special Test Equipment** designed to accomplish a specific purpose.

b. **Three types of Facilities Contracts Exist:**

i. Consolidated Facilities Contracts, which provide for

(a) The acquisition, construction, and installation of facilities, **and**

(b) The use, maintenance, accountability and disposition of facilities.

ii. **Facilities Acquisition Contracts** which provide for the acquisition, construction, and installment of facilities, and

iii. **Facilities Use Contracts,** which provide for the use, maintenance, accountability, and disposition of facilities.

c. **Maintenance**

Each Facilities Contractor must have a maintenance program which

i. Specifically provides for protection, preservation, maintenance, and repair in accordance with sound industrial practice, and

ii. Generally covers other areas of maintenance.

d. A Facilities contract **will be terminated** when the property covered by it is no longer required for the performance of Government contracts or subcontracts, **unless** such termination is detrimental to the Government's interests.

PREFERENCE FOR CERTAIN DOMESTIC COMMODITIES J-7

Reference

ASPR 7-403.6 incorporates 7-104.13 (1967 SEP) in accordance with Section VI, Part 3

Source Of Clause

Regulation; see also annual Department of Defense Appropriation Acts (e.g. Act of 1974, Public Law 93-238 §724 Jan. 2, 1974)

J-7

J-8 USE OF GOVERNMENT FACILITIES ON A NO-CHARGE BASIS (1974 JUN)

(a) The Contractor is authorized to use, in the performance of this contract, the Government-owned facilities provided to it under Facilities Contract in effect on the date of this contract, on a no-charge basis.

Purpose Of Clause J-7

To aid the American farmer (and to a lesser extent the American businessman and worker) by requiring that certain commodities delivered under the contract either originate in or are transformed in the United States.

Comment

1. This clause is to be used in all contracts for the procurement of food, clothing, and the textiles listed below, and ordinarily would not be included in research and development contracts.

IF

2. under the contract the Contractor delivers articles of
   - a. food
   - b. clothing
   - c. the following textiles
     - i. cotton
     - ii. woven silk, woven silk blends, and spun silk yarn for cartridge cloth
     - iii. coated synthetic fabric, or
     - iv. wool, in any form

THEN

such articles **must** have been
- a. grown,
- b. reprocessed,
- c. reused, or
- d. produced

in the United States, its possessions, or Puerto Rico.

HOWEVER,

3. the Contractor may deliver **foods** that have been
   - a. manufactured, or
   - b. processed

   in the United States, its possessions or Puerto Rico **regardless** of where grown, reprocessed or produced.

4. The above restriction shall not apply as to articles which the Secretary has determined **cannot** be procured
   - a. in sufficient quantity
   - b. of a satisfactory quality
   - c. as and when needed, **and**
   - d. at United States market prices.

Flow Down

Not required. Since it is the Contractor's responsibility to deliver only domestic commodities under the contract, he should in some way assure himself that articles delivered to him by a Subcontractor that are delivered to the Government conform with the requirements of this clause.

Special Notes

1. Many Department of Defense Appropriation Acts restrict the use of funds thereunder to the purchase of domestic commodities or other domestic products. These restrictions may differ slightly from those of the ASPR, and of course might differ from year to year.
2. See also the clause ''Preference for Domestic Specialty Metals'' ASPR 6.305(c) (1972 NOV), and Public Law 93-238 §724, January 2, 1974, which contain similar restrictions on the Contractor's delivery of specialty metals.

USE OF GOVERNMENT FACILITIES ON A NO-CHARGE BASIS J-8

J-8 (b) The following Subcontractors having Government-owned facilities provided under the Facilities Contracts set forth below, in effect on the date of this contract, are authorized to use such facilities on a no-charge basis for the subcontract items listed below, and the subcontract shall so provide:

Subcontractor	Facilities Contract Number	Subcontract Item

(c) If the Contractor enters into subcontracts with Subcontractors who have Government-owned facilities provided to them under Facilities Contracts which provide that no-charge use may be authorized, the Contracting Officer may authorize the use of such facilities on a no-charge basis, provided (i) he determines that such use will not give the Subcontractor a favored competitive position, and (ii) this contract is amended to reflect adequate consideration to the Government for the use of such facilities on a no-charge basis. Such subcontracts shall specifically authorize the no-charge use, and require the manual approval of the Contracting Officer. No amendments to this contract will be required, as provided in (ii) above, if the Contracting Officer determines that an elimination of charge for use of such facilities will of itself result in an adequate decreased cost to the Government under this contract.

(d) If the Government-owned facilities provided to the Contractor or any Subcontractor hereunder on a no-charge basis are increased or decreased or do not remain available during the performance of this contract, or if any change is made in the terms and conditions under which they are made available, such equitable adjustments as may be appropriate will be made in the terms of this contract, unless such increase or decrease was contemplated in the establishment of the price of this contract or a subcontract.

(e) The Contractor agrees that it will not directly or indirectly, through overhead charges or otherwise, include in the price of this contract, or seek reimbursement under this contract for, any rental charge paid by the Contractor for the use on other contracts of the facilities referred to herein. Any subcontract hereunder which authorizes the Subcontractor to use Government facilities on a no-charge basis shall contain a provision to the same effect as this paragraph (e).

Reference

AF ASPR 7-5000.8 (1974 JUN)

Source of Clause

Regulation.

Purpose of Clause

To permit the no-charge use by Contractors and Subcontractors of Government facilities during Government contracts or Subcontractors and to state the conditions for such use.

Comment

IF

1. facilities have been placed with a Contractor or Subcontractor **under a facilities contract, then** the contract may provide that such facilities may be used on a no-charge basis, subject to the conditions below.
2. **Generally,** the Contractor or any Subcontractors shall **not**
   a. have a competitive advantage as a result of being allowed to use Government facilities on a no-charge basis.
   b. Include under this contract, any rental charge paid for such facilities under other contracts, either as direct or indirect costs.
3. **Specifically,** a Government facility may be used on a no-charge basis
   a. **by the Contractor, only if**
      i. the Government receives adequate consideration in **this** contract (e.g, in the form of a decreased price or estimated cost),
      ii. the facilities contract provides that no-charge use may be authorized, and
      iii. the facilities are specifically listed on the contract schedule.
   b. **by a Subcontractor known** at the time of contracting, **only if**
      i. it is specifically understood when the price contract is negotiated that use on a no-charge basis is contemplated, and
      ii. the facilities are specifically listed on the contract schedule.
   c. **by a Subcontractor not known** at the time of contracting, **only if**
      i. the Government receives adequate consideration in **this** contract
      ii. the facilities contract provides that no-charge use may be authorized, and
      iii. the **subcontract specifically** authorizes it, and is ''manually approved'' by the Contracting Officer.
4. **Equitable adjustments** shall be made in the terms of the main contract
   IF
   a. The Government-owned facilities provided on a no-charge basis to the Contractor or Subcontractor
      i. are increased
      ii. are decreased, or
      iii. do not remain available throughout the contract, **OR**
   b. any change is made in the terms and conditions under which the facilities are available.

   However, no adjustments will be made if the potential of such changes was considered when establishing the original price of the contract or subcontract.

Flow Down

Required. Subcontractors must agree not to include rental charges on facilities used on a no-charge basis in their costs, either direct or indirect.

Special Notes

None.

SECTION K
COPYRIGHT, DATA, PATENTS

K-1 AUTHORIZATION AND CONSENT (1961 JAN)

The Government hereby gives its authorization and consent for all use and manufacture of any invention described in and covered by a patent of the United States in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract).

(End of clause)

K-2 CONTRACT SCHEDULE ITEMS REQUIRING EXPERIMENTAL, DEVELOPMENTAL OR RESEARCH WORK (1972 APR)

For purposes of defining the nature of the work and the scope of rights in data granted to the Government pursuant to the ''Rights in Technical Data'' clause of this contract, it is understood and agreed that items **(list applicable schedule line items or sub-line items, or data exhibit numbers)** require the performance of experimental, developmental, or research work. This clause does not constitute a determination as to whether or not any data required to be delivered under this contract falls within the definition of limited rights data.

AUTHORIZATION AND CONSENT

References

ASPR 7-402.20 incorporates 7-302.21 (1961 JAN)
HEW-315 (Rev. 12/72)
NASA PR 9-103 (1964 JAN)

Source of Clause

Regulation, under 28 U.S.C. 1498(a)

Purpose of Clause

To insure that work by a Contractor or Subcontractor under the contract will continue, and not be enjoined, if a patent infringement suit is brought.

Comment

Under 28 U.S.C. §1498(a) (1970), when the Government has authorized or consented to a Contractor 's or Subcontractor 's manufacturing or using a patented invention, a patent infringement suit based on such manufacture or use can only be maintained against the Government, and only for compensatory damages.

In this clause, the Government gives its authorization and consent for **all** use and manufacture of **any** invention described in and covered by a U.S. Patent in the performance of

1. This contract
2. Any part of or amendment to this contract
3. Any subcontract
4. Including any lower-tier subcontract

Flow Down

Not required. However, Subcontractors are specifically covered by the clause and it should be included in subcontracts at all tiers.

Special Notes

None.

CONTRACT SCHEDULE ITEMS REQUIRING EXPERIMENTAL, DEVELOPMENTAL, OR RESEARCH WORK

Reference

ASPR 7-104.9(j) (1972 APR)

Source of Clause

Regulation.

Purpose of Clause

To reduce controversy over the scope of the Government's rights in technical data resulting from the contract by specifying those parts of the contract which require the performance of experimental, developmental, or research work.

Comment

IF

1. this clause is included in the contract

K-2

K-3 FILING OF PATENT APPLICATIONS (1969 DEC)

(a) Before filing or causing to be filed a patent application in the United States disclosing any subject matter of this contract, which subject matter is classified ''Secret'' or higher, the Contractor shall, citing the thirty (30) day provision below transmit the proposed application to the Contracting Officer for determination whether, for reasons of national security, such application should be placed under an order of secrecy or sealed in accordance with the provisions of 35 U.S.C. 181-18 or the issuance of a patent should be otherwise delayed under pertinent United States statutes or regulations; and the Contractor shall observe any instructions of the Contracting Officer with respect to the manner of delivery of the patent application to the United States Patent Office for filing, but the Contractor shall not be denied the right to file such patent application. If the Contracting Officer shall not have given any such instructions within thirty (30) days from the date of mailing or other transmittal of the proposed application, the Contractor may file the application.

(b) The Contractor shall furnish to the Contracting Officer, at the time of or prior to the time when the Contractor files or causes to be filed a patent application in the United States disclosing any subject matter of this contract, which subject matter is classified ''Confidential,'' a copy of such application for determination whether for reasons of national security, such application should be placed under an order of secrecy or the issuance of a patent should be otherwise delayed under pertinent United States statutes or regulations.

(c) Where the subject matter of this contract is classified for reasons of security, the Contractor shall not file, or cause to be filed in any country, other than in the United States as provided in (a) and (b) of this clause, an application or registration for a patent containing any of said subject matter without first obtaining written approval of the Contracting Officer.

(d) When filing any patent application coming within the scope of this clause, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter, and shall also promptly furnish to the Contracting Officer the serial number, filing date, and name of country of any such patent application. When transmitting the application to the United States Patent Office, the Contractor shall by separate letter identify by agency and number the contract or contracts which require security classification markings to be placed on the application.

(e) The substance of this clause shall be included in all subcontracts which cover or are likely to cover classified subject matter.

THEN

the Contractor agrees that **at least the items listed** in the schedule (and in this clause) require performance of experimental, developmental, or research work.

2. **Effect of the Listing**
   The Government has **unlimited** rights in any technical data that directly result from such listed items. (ASPR 7-104.9(a) paragraph (b) (1) (i)).
3. **Additional Government Rights**
   The Government **may also have unlimited rights in** technical data directly resulting from **unlisted items**
   a. if experimental, developmental, or research work was involved, **or**
   b. pursuant to the ''Rights in technical data'' clause (see ASPR 7-104.9(a), paragraph (b) (ii-vii).

Flow Down

Not required.

Special Notes

If the Contractor wants the Government to have only limited rights to data from experimental, research, or developmental work, it must make a separate specific agreement with the Government to that effect (see ''Rights in technical data, '' ASPR 7-104.9(a) paragraph (b) (2) (i).

FILING OF PATENT APPLICATIONS

K-3

References

ASPR 7-403.2 incorporates 7-104.6 (1969 DEC) in accordance with 9-106
NASA PR 9-107

Source of Clause

Regulation, supplementing 18 U.S.C. §§793 et seq., and 35 U.S.C. §§181-188 (66 Stat. §§805-808).

Purpose of Clause

To prevent the disclosure of classified subject matter by a Contractor in its patent application or by the issuance of patents.

Comments

1. A **classified contract** is any contract which,
   a. requires, or
   b. might require

access to classified information by the Contractor or its employees in the performance of the contract. Work under a contract may be classified even though the contract document is not classified.

IF

2. a Contractor is,
   a. working under a classified contract, and
   b. wishes to file a patent application **disclosing** subject matter that is classified

THEN

a. **Prior to or at the time of filing** a U. S. patent application, disclosing information classified **"Confidential,"** the Contractor shall furnish the Contracting Officer with a copy thereof.
b. **Prior to filing** a U. S. patent application disclosing information classified **"Secret"** or higher, the Contractor shall furnish the Contracting Officer with a copy thereof, citing that the Contracting Officer has 30 days from the date of transmittal to place the application under an order of secrecy or sealed under 35 U.S.C. §§181-188.
c. The Contractor shall not file such an application in any foreign country without the prior written

K-3

K-4 NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (1965 JAN)

The provisions of this clause shall be applicable only if the amount of this contract exceeds $10,000.

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be turnished at the expense of the Government except where the Contractor has agreed to indemnify the Government.

(c) This clause shall be included in all subcontracts.

approval of the Contracting Officer.

3. After being informed of a U.S. patent application, the Contracting Officer shall determine if the application contains classified material. If he so determines, the Contracting Officer shall:
   a. determine whether the
      i. application shall be sealed or placed under an order of secrecy pursuant to 28 U.S.C. §§181-188, **or**
      ii. issuance of a patent shall be delayed (such a determination shall not prevent the Contractor from filing a patent application) **and**
   b. inform the Contractor of security instructions relating to the transmittal of the application to the U. S. Patent Office.
4. For any application containing classified information, the Contractor shall:
   a. comply with all applicable security instructions;
   b. furnish the Contracting Officer with the serial number, filing date and name of the country of any such patent application; and
   c. when applying for a U. S. patent, provide by separate letter to the U. S. Patent Office, identification by agency and number the contracts requiring security classification markings.

Flow Down

Required under ASPR in all subcontracts which cover or might cover classified subject matter. This clause is not required in subcontracts by NASA PR. However, the Contractor should include the substance of this clause where applicable.

Special Notes

1. The Contractor's invention may not be kept secret and the grant of the patent may not be withheld for more than one year unless;
   a. the withholding order is renewed; or
   b. the U. S. is at war, in which case the order continues in effect until one year after the war; or
   c. there is a national emergency, declared by the President, in which case the order continues in effect until 6 months after the end of the national emergency. 35 U.S.C. 181.
2. If the Contracting Officer gives no instructions concerning subject matter classified ''Secret'' or higher within 30 days of the mailing or other transmittal to him of the proposed application, the Contractor is free to file its application.
3. Any knowing and wilful communication of classified information to unauthorized persons, or any violation of an order of secrecy, whether in a patent application or otherwise, is punishable by a fine not to exceed $10,000 and imprisonment. See 18 U.S.C. §§793, 798, and 35 U.S.C. §186.

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT K-4

References

ASPR 7-402.21 incorporates 7-103.23 (1965 JAN) in accordance with 9-104
FPR 1-7.202-24 incorporates 1-7.103-4
HEW-315 (Rev. 12/72)
NASA — 9-105

Source of Clause

Regulation.

Purpose of Clause

To require the Contractor to inform the Government of patent and copyright infringement suits arising out of the contract. To require the Contractor to assist the Government in the defense of such suits.

Comment

IF

1. there is a claim or suit of patent or copyright infringement arising out of performance under the contract,

K-4

K-5 PATENT RIGHTS

(a) **Definitions.** As used in this clause, the term (1) ''Invention'' or ''Invention or discovery'' includes any art, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plant, which is or may be patentable under the Patent Laws of the United States; and (2) ''Made,'' when used in relation to any invention or discovery, means the conception or first actual or constructive reduction to practice of such invention.

(b) **Disclosure.** Whenever an invention or discovery is made by the Contractor or its employees in the course of or under this contract, the Contractor shall immediately give the Contracting Officer written notice thereof and shall promptly thereafter furnish the Contracting Officer with complete information thereon, including as a minimum (1) a complete written disclosure of each such invention, and (2) information in writing as soon as practical, concerning the date and identity of any public use, sale, or publication of such invention made by or known to the Contractor.

(c) **Determination of rights.** The Secretary or his duly authorized representative, shall have the sole and exclusive power to determine whether or not and where a patent application shall be filed and to determine the disposition of all rights in any invention made under this contract, including title to and rights under any patent application or patent which may issue thereon. The Secretary, or his duly authorized representative, may, upon the request of the Contractor, determine to exercise his option to waive rights to any such invention in foreign countries. The determination of the Secretary, or his duly authorized representative, on all these matters shall be accepted as final and the provisions of the clause of this contract entitled ''Disputes'' shall not apply. The Contractor shall use his best efforts to assure that all of its employees who may be the inventors of any such invention will execute all documents and do all things necessary or proper to effectuate the determination of the Secretary, or his duly authorized representative, or to vest in the Government the rights granted to it under this clause and to enable the Government to apply for and prosecute any patent application, in any country, covering such invention where the Government has the right under this clause to file such application.

(d) **Contractor employees and Subcontractors.** The Contractor shall:

(1) Obtain patent agreements to effectuate the provisions of this clause from all persons who perform any part of the work under this contract and may be reasonably expected to make inventions.

(2) Insert in each subcontract having experimental, developmental or research work as one of its purposes, a provision making this clause applicable to the Subcontractor and its employees.

(e) **Reports.** The Contractor shall furnish the Contracting Officer, in addition to the information called for in paragraph (b) of this clause:

(1) Interim reports on the first anniversary of the contract, where extended or renewed, and every year thereafter listing all inventions made during the period, whether or not previously reported, or certifying that no inventions were made during the applicable period; and

(2) A final report, prior to final settlement of this contract, listing all such inventions made in the course of or under this contract, including all those previously listed in interim reports, or certifying that there are no such unreported inventions.

the Contractor shall

a. Promptly notify the Contracting Officer.

b. Give a reasonable detailed **written** account of the claim or suit.

IF

2. such claim or suit is **against the Government,** the Contractor shall assist the Government in its defense by making available all pertinent evidence and information in the Contractor's possession.
3. The furnishing of such information and evidence shall be at the Government's expense **unless** the Contractor has agreed to indemnify the Government.

Flow Down

ASPR **requires** this clause to be included in **all** subcontracts. Moreover, if it is omitted from a subcontract, it will be read into that subcontract by operation of law.

No flow down is required in the HEW and FPR clauses.

Special Notes

1. This clause is required for all contracts under HEW, required in all contracts exceeding $10,000 under FPR, and applicable only for contracts exceeding $10,000 under ASPR.
2. If a Research and Development Contractor is working under the ''Authorization & Consent'' (see that clause) of the Government, the owner of a patent or copyright can only sue the Goverment for its infringement by a Contractor, **and** the Contractor may not indemnify the Government for its liabilities and costs caused by such an infringement. However, such an ''authorization and consent'' **Prohibition** of indemnification exists **only** under ASPR and NASA and **only** for patent infringements.

PATENT RIGHTS

Reference

HEW-315 (Rev. 12/72)

Source of Clause

Regulation. See also the Executive Memorandum of 10 October 1963 (28 F.R. 10943), as revised by Executive Memorandum of 23 August 1971 (36 F.R. 16887).

Purpose of Clause

To enable the Government to obtain patents for inventions made under the contract, when it so desires. To specify the Contractor's duties in respect to such inventions.

Comment

1. **Determination of Rights**

IF

any invention (something which **may** be patentable in the United States) is

a. first conceived, or

b. first reduced to actual practice under the contract

THEN

the Secretary of the Department of Health, Education, and Welfare (or his authorized representative) has the **exclusive** power

a. to **decide** whether a patent application shall be filed

b. to **allocate all rights** under any such invention, **including** those under any resulting patent(s).

2. **The Contractor's Duties**

To aid the Government in obtaining such rights, and to protect such rights when granted the Contractor must

a. see to it that employees who make an invention **execute all necessary documents** and **generally assist** the Government in obtaining and protecting patents

K-5 (f) **Withholding payment for failure to comply.** At any time during the performance of this contract, the Contracting Officer may direct that payment be withheld in the amount of 10 per cent of the total amount obligated by the Government with respect to this contract or $10,000, whichever is less, if the Contracting Officer determines that the Contractor has failed to furnish any of the written notices, disclosures, or reports required by paragraphs (b) and (e) above, until such time as the Contractor shall have corrected such failure. The withholding of any amount or subsequent payment thereof to the Contractor or the failure to withhold any amount shall not be construed as a waiver of any rights accruing to the Government under the contract. The paragraph shall not be construed as requiring the Contractor to withhold any amounts from a Subcontractor to enforce compliance with the patent provisions of a subcontract.

(g) **Acknowledgement.** With respect to any patent application on any invention made in the course of or under this contract, the Contractor shall incorporate in the first paragraph of the patent specification, and prominently in any patent issued thereon, the following statement:

''The invention described herein was made in the course of or under a contract with the U.S. Department of Health, Education, and Welfare.''

K-6 PATENTS

(a) Whenever any invention or discovery is made or conceived by the Contractor or its employees in the course of or under this contract, the Contractor shall promptly furnish the Commission with complete information thereon; and the Commission shall have the sole power to determine whether or not and where a patent application shall be filed, and to determine the disposition of the title to and rights in and to any invention or discovery and any patent application or patent that may result. The judgment of the Commision on these matters shall be accepted as final; and the Contractor, for itself and for its employees, agrees that the inventor or inventors will execute all documents and do all things necessary or proper to carry out the judgment of the Commission.

(b) No claim for pecuniary award or compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted by the Contractor or its employees with respect to any invention or discovery made or conceived in the course of or under this contract.

(c) Except as otherwise authorized in writing by the Commission, the Contractor will obtain patent agreements to effectuate the purposes of paragraphs (a) and (b) of this article from all persons who perform any part of the work under this contract, except such clerical and manual labor personnel as will not have access to technical data.

(d) Except as otherwise authorized in writing by the Commission, the Contractor will insert in all subcontracts and purchase orders other than purchase orders for standard commercial items provisions making this article applicable to the subcontract or purchase order. Except as otherwise authorized in writing by the Commission, the Contractor will insert in purchase orders for standard commercial items a provision indemnifying the Government against liability for use of any invention or discovery and for its infringement of any Letters Patent arising by reason of the purchase, use, or disposal by or for the account of the Government of items manufactured or supplied under the purchase order.

(e) With respect to any U. S. Patent Application filed by the Contractor on any contract invention or discovery made or conceived in the course of the contract, the Contractor will incorporate in the first paragraph of the U. S. Patent Application the following statement: ''The invention described herein was made in the course of, or under, a contract (if desired, may substitute contract with identifying number) with the U. S. Atomic Energy Commission.''

b. **obtain** (when entering into a contract), from all employees reasonably expected to make inventions, any agreements that may be necessary to insure that the **Government** shall have the patent rights to any inventions made by them under the contract K-5

c. immediately give to the Contracting Officer a **written** notice and **detailed description** of any invention first conceived or reduced to practice under the contract

d. notify the Contracting Officer **in writing** of any known use, sale, or publication of the invention

e. make interim annual reports **and** a final report
   - i. listing inventions under the contract, **or**
   - ii. certifying that there have been none.

3. **Enforcement**

IF

the Contractor fails to make any of the required notices or reports

THEN

the Government has the power to

a. **withhold payment** until the failure is corrected, up to the lesser of
   - i. 10% of the contract's estimated cost, or
   - ii. $10,000 **and/or**

b. use any other remedy available to it (see e.g. the ''Terminations'' clause).

4. **Acknowledgement**

The Contractor must acknowledge the **Government's sponsorship** on any patent application which it is permitted to file.

Flow Down

Required, in all experimental research or developmental subcontracts.

However, the Contractor **is not required** to withhold payment from its Subcontractors.

Special Notes

At the request of the Contractor, the Secretary (or his authorized representative) may decide whether to **waive** the Government's right in **foreign countries** to inventions made under the contract.

PATENTS

K-6

References

AEC PR 9-9.5003 as incorporated and modified by 9-16.5002-8 Articles B-111 and B-V111 for special research support agreements with educational institutions and 9-16.5002-9 Articles B-6 and B-7 for cost-type contracts.

Source of Clause

Atomic Energy Act of 1954 as amended, 42 U.S.C. §2182; (1970) Presidential Statement on Government Patent Policy, October 10, 1963.

Purpose Of Clause

To protect the Government's interests in inventions or discoveries made under a research and development contract with the Atomic Energy Commission by establishing Government control over the patent rights to such inventions or discoveries.

Comment

1. **Basic Atomic Energy Commission Control Over Inventions and Patents**

The Atomic Energy Commission (AEC) has the **sole** power to make **final** determinations regarding the disposition of title to and rights in any invention, discovery, patent application, or patent that may result from the course of or under the contract. This includes the power to determine

a. **Whether or not** a patent application will be filed, and

K-6

K-7 PROPERTY RIGHTS IN INVENTIONS (1972 NOV)

(a) This contract and all subcontracts issued thereunder are subject to Section 305 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2457) relating to property rights in inventions. The term ''invention'' includes any invention, discovery, improvement, or innovation. Any invention made in the performance of work under this contract or any subcontract issued thereunder shall be presumed to have been made under the conditions of and subject to Section 305(a) of the Act and becomes the exclusive property of the United States subject, however, to the retention by the Contractor or Subcontractor of a royalty-free license to practice the invention pursuant to, and of the scope defined in, 14 C.F.R. 1245.204(a). This license may be revoked under the conditions set forth in 14 C.F.R. 1245.211(b), and (c). The Contractor or applicable Subcontractor may petition for waiver of title to the invention in accordance with the NASA Patent Waiver Regulations, 14 C.F.R. 1245, Subpart 1.

(b) The Contractor shall furnish to NASA a written report containing full and complete technical information concerning any invention made in the performance of any work under this contract promptly upon the making of such invention and shall require all Subcontractors to do so. Upon written request by NASA, the Contractor shall furnish additional information available to him, and shall secure the execution of such documents as may be necessary to enable the Administrator, NASA, to file and prosecute patent applications on any such invention. Upon completion of the work under this contract, the Contractor shall furnish to NASA a report as to whether or not inventions of the type referred to herein have been made in the performance of such work.

b. **Where** a patent application will be filed. K-6

2. **Contractor's Duties:** The Contractor
   - a. Must furnish the AEC complete information on any invention or discovery whenever made or conceived in the course of or under the contract.
   - b. Must, unless otherwise authorized in writing by the AEC,
     - (i. Obtain patent agreements from itself and its employees that the inventors
       - (a) will execute all documents and do all things necessary to carry out the AEC's determinations on inventions and patents, and
       - (b) will not assert any claim for pecuniary award or compensation relating to any invention or discovery under the contract.
     - ii. Insert provisions making the clause applicable in all
       - (a) Subcontracts, and
       - (b) Purchase orders other than purchase orders for standard commercial items.
     - iii. Insert a provision in all purchase orders for standard commercial items indemnifying the Government against liability for
       - (a) Use of any invention or discovery
       - (b) The infringement of any patent arising because of the purchase, use, or disposal by or for the Government of items manufactured or supplied by purchase order.
   - c. Shall use specified language acknowledging the AEC's contract when it files a U.S. patent application for any invention or discovery covered by this clause.

3. **Publication of Results**

The Contractor may publish, within the limits of security requirements,

- a. **Research Results** through normal and accepted channels. In so doing, it must
  - i. Indicate that the research was sponsored by the AEC,
  - ii. Furnish the AEC with copies of each article as submitted **and** as finally published.
- b. **Information** regarding technological and scientific developments arising under the contract. Such information
  - i. Must receive AEC release approval prior to publication **or**
  - ii. Shall be withheld from the public if it discloses an invention until four months (or a shorter period if approved) after AEC patent review.

Flow Down

Required.

Special Notes

None.

PROPERTY RIGHTS IN INVENTIONS

K-7

Reference

NASA PR 9.101-5 (1972 NOV)

Source of Clause

Regulation implementing Section 305 of the National Aeronautics and Space Act of 1958 (42 U.S.C. §2457 (1970))

Purpose of Clause

To regulate ownership of all inventions made under Government NASA contracts so that their widespread use or application will be promoted.

Comment

1. An ''invention'' includes any
   - a. Invention
   - b. Discovery
   - c. Improvement
   - d. Innovation.
2. **The Government's Property Rights in Inventions**

   IF
   the NASA administrator determines that
   - a. The person who made the invention was employed to perform research, development, or exploratory work and the invention was
     - i. Related to that work, or
     - ii. Within the scope of his working duties, regardless of whether or not the invention was made
       - (a) During working hours
       - (b) With a contribution by the Government,

   OR
   - b. The person who made the invention was not employed to perform research, development, or exploratory work **but** the invention
     - i. Is related to the contract
     - ii. Was made during working hours or with a contribution by the Government,

   THEN

   the United States Government will
   - a. Hold the exclusive property rights (subject to the inventor's license) to any invention made in performance of work under a NASA contract.
   - b. Be issued the patent to any such invention when it is patentable.
3. **The Contractor's Disclosure Duties**

   The Contractor must
   - a. Promptly **on making an "Invention"** during performance of the contract furnish NASA a written report containing full and complete technical information concerning such invention
   - b. **On written request** by NASA
     - i. Furnish additional information
     - ii. Secure execution of such documents as necessary for NASA to file and prosecute patent applications on any such invention.
   - c. **On completion of contract** work, furnish NASA a report as to whether or not any inventions covered by this clause have been made in performance of this contract.
4. **The Inventor's License**
   - a. The Government's property right in inventions is subject to the retention by the inventing Contractor or Subcontractor of a license which is
     - i. Revocable,
     - ii. Nonexclusive,
     - iii. Royalty-free.
   - b. This license includes the
     - i. Power to grant a sublicense of the same scope **but only to** the extent of any legally binding obligation existing at the time of contract award.
     - ii. Right to transfer the license and power to sublicense **but only to** the successor to that part of the Contractor's business to which the patent pertains
5. **Revocation of the License: Standards and Procedures**
   - a. The inventor's License may be revoked in part or in its entirety by the NASA Administration, if
     - i. In his opinion revocation is necessary to promote earliest practical application of the invention **and** a proper petition for an exclusive license has been submitted, or
     - ii. The licensee has breached a covenant or agreement contained in the license **and** failed to remedy the breach within 30 days after written notice thereof.

b. Prior to revocation, the licensee
  - i. Must receive a written notice of intention to revoke, and
  - ii. Be allowed 30 days after such receipt within which to appeal and request a hearing before the Inventions and Contributions Board.

c. After a hearing, the Inventions and Contributions Board shall send the Administrator
  - i. The record of its proceedings.
  - ii. Its findings of fact.
  - iii. Its recommendations as to whether the license should be revoked in whole or in part.

d. The Administrator shall
  - i. Review the Board's recommendation.
  - ii. Determine whether to revoke the license in whole or in part .

  Note: Revocation of a license revokes all sublicenses.

6. **The Government May Waive its Property Rights in Inventions**

The Contractor may petition the Government to waive

a. Its **domestic rights in any or all inventions in advance of their discovery** by petitioning prior to or within 30 days after execution of the contract. This petition **may be approved if** the NASA Inventions and Contributions Board
  - i. Finds that exceptional circumstances exist which mean that the public interest would be best served by the waiver, **or**
  - ii. Finds that
    - (a) The contract **is not**
      - (1) Intended to yield products or processes for commercial use and
      - (2) Intended to explore fields of direct concern to public health, safety, or welfare, and
      - (3) For work in a field
        - (a) Dominated by Government funding or development
        - (b) Where exclusive rights would put the petitioner in a preferred or dominant position, and
    - (b) The contract is not for the services of the Contractor to
      - (1) Operate a Government owned research or production facility or
      - (2) Coordinate or direct the work of others and
    - (c) The purpose of the contract is to
      - (1) Build upon existing knowledge or technology.
      - (2) Develop information, products or processes for use by the Government, **and**
    - (d) The petitioner has technical competence in the field of technology involved **and either**
      - (1) The work is directly related to petitioner's established non-governmental commercial position, or
      - (2) The public interest in availability of the invention will be served by the Government's waiving rights even though the petitioner has no firmly estabished commercial position.

b. Its domestic rights in any or all inventions after discovery by petitioning prior to NASA's filing a U.S. patent application. This petition may be approved

  IF
  - i. the NASA Inventions and Contributions Board finds that the invention
    - (a) Is not directly related to any Government program promoting products or processes for any general public use at home or abroad, and
    - (b) Is not likely to be required by Government regulation for general public use at home or abroad, and
    - (c) does not directly concern public health, safety, or welfare, and
    - (d) Would more likely reach the public at an early date under the petitioner's plans and the incentives of a waiver **and** is not in a field of research
      1. Dominated by Government funding and development
      2. Where exclusive rights would put the petitioner in a preferred or dominant position

  OR
  - ii. **If all but one** of the above requirements are met, **but only if** the Inventions and Contributions Board also finds that
    - (a) A waiver is necessary in order to call forth risk capital and funds to produce a practical or

commercial application of the invention, **OR**

(b) The Government's contribution to the invention is small compared to that of the Contractor.

c. Its foreign rights by petitioning for such waiver at the same time as the petition for waiver of domestic rights or separately. Foreign rights may be waived
   i. Concurrently with the waiver of domestic rights when the Inventions and Contributions Board makes the finding necessary to support a waiver of such domestic rights.
   ii. Separately, when the Board decides that such serves the economic interests of the United States.

7. **Rights Reserved by the Government Even Upon A Waiver**
   a. The Government **always** reserves a license which is
      i. Irrevocable
      ii. Nonexclusive
      iii. Non transferable, and
      iv. Royalty-free

      For the practice of any invention throughout the world by or on behalf of
      i. The U.S. Government, or
      ii. Any Government agency, or
      iii. Any state, or
      iv. Any domestic municipal government unless the NASA Administrator determines that such is not in the best interests of the United States, or
      v. Any foreign government as provided under a treaty with the United States.
   b. When waiving property rights in inventions, the Government will
      i. **In a domestic rights waiver,** always reserve the right to compel the Contractor to grant either an exclusive or a non-exclusive license upon terms reasonable in the circumstances
         (a) **Unless** within three years after a U.S. patent issues, the waiver recipient has taken effective steps
            (1) To bring the benefit of the invention to the public
            (2) To license the patent
         (b) As may be appropriate to satisfy
            (1) Government regulations for the invention's use
            (2) Health and safety needs
            (3) Other public purposes stipulated in the contract.
      ii. In a **domestic or foreign rights waiver** make all other reservations called for by the NASA Administrator upon the grant of the waiver.

8. **Voiding of the Government's Waiver of Property Rights**
   a. **Domestic** waivers may be avoided at the option of the NASA Administrator

      UNLESS
      i. A patent is filed by the waiver recipient within 8 months of the
         (a) Reporting of the invention where an advance waiver had been granted,
         (b) Granting of a waiver after reporting the invention, **AND**
      ii. A copy of the patent application is promptly filed with the Inventions and Contributions Board, and
      iii. The patent application bears the proper acknowledgement, and
      iv. All required licenses have been granted.
      v. Periodic reports are properly filed on progress and activity under the patent.
   b. **Foreign waivers** may be voided at the option of the NASA Administrator

      UNLESS
      i. Foreign patent application is made within
         (a) Nine months from the filing date of the corresponding U.S. Patent
         (b) Six months from the grant of the waiver, or
         (c) Such longer periods as expressly provided by the Administrator.
      ii. Information concerning the foreign patent is reported.
      iii. Proper instruments are executed and delivered to the Inventions and Contributions Board confirming the reserved rights of the Government.

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K-8 PATENT RIGHTS (TITLE) (1969 DEC)

(a) **Definitions Used in This Clause.**

(1) **Subject Invention** means any invention or discovery, whether or not patentable, conceived or first actually reduced to practice in the course of or under this contract. The term ''Subject Invention'' includes, but is not limited to, any art, method, process, machine, manufacture, design or composition of matter, or any new and useful improvement thereof, or any variety of plant, which is or may be patentable under the patent laws of the United States of America or any foreign country.

(2) **Governmental purpose** means the right of the Government of the United States (including any agency thereof, state or domestic municipal government) to practice and have practiced (make or have made, use or have used, sell or have sold) any Subject Invention throughout the world by or on behalf of the Government of the United States.

(3) **Contract** means any contract, agreement, grant, or other arrangement, or subcontract entered into with or for the benefit of the Government where a purpose of the contract is the conduct of experimental, developmental, or research work.

(4) **Subcontract and Subcontractor** means any subcontract or Subcontractor of the Contractor, any lower tier subcontract or Subcontractor under this contract.

(5) **To bring to the point of practical application** means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine or system and, in each case, under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public.

(b) **Rights Granted to the Government.** Except as provided in (e) and (h) of this clause, the Contractor agrees to grant the Government all right, title and interest in and to each Subject Invention (made by the Contractor), subject to the reservation of a nonexclusive and royalty-free license to the Contractor. The license shall extend to existing and future associated and affiliated companies, if any, within the corporate structure of which the Contractor is a part and shall be assignable to the successor of that part of the Contractor's business to which such Invention pertains. Nothing contained in this Patent Rights clause shall be deemed to grant any rights with respect to any invention other than a Subject Invention.

(c) **Invention Disclosures and Reports.**

(1) With respect to Subject Inventions (made by the Contractor), except those which are obviously unpatentable under the patent laws of the United States, the Contractor shall furnish to the Contracting Officer:

- (i) a written disclosure of each invention within six (6) months after conception or first actual reduction to practice, whichever occurs first under this contract, sufficiently complete in technical detail to convey to one skilled in the art to which the Invention pertains a clear understanding of the nature, purpose, operation, and to the extent known the physical, chemical, or electrical characteristics of the Invention; when unable to submit a complete disclosure, the Contractor shall within said six (6) month period submit a disclosure which includes all such technical detail then known to him and shall, unless the Contracting Officer authorizes a different period, submit all other technical detail necessary to complete the disclosure within three (3) months of the expiration of said six (6) month period;
- (ii) interim reports at least every twelve (12) months, the initial period of which shall commence with the date of this contract, each report listing all such Inventions conceived or first actually reduced to practice more than six (6) months prior to the date of the report and not listed on a prior interim report, or certifying that there are no such unreported Inventions;
- (iii) prior to final settlement of this contract, a final report listing all such inventions including all those previously listed in interim reports, or certifying that there are no such unreported Inventions (This Final Report and any Interim Report under (ii) above shall be submitted on DD Form 882 or other format acceptable to the Contracting Officer);
- (iv) information in writing, as soon as practicable, of the date and identity of any public use, sale, or

iv. The petitioner who decides not to prosecute the application or to abandon the patent notifies the Government and provides it with the necessary instruments to reassume its patent rights. K-7

Flow Down

Required

Special Notes

1. Domestic waivers of the Government's property rights in inventions may also be voided when a final determination has been made by a competent authority that the patent under waiver has been used in violation of the anti-trust laws.

PATENT RIGHTS K-8

TITLE LICENSE DEFERRED

References

ASPR 7-402.22 incorporates 7-302.23(a) (Title) (1969 DEC); 7-302.23(b) (License) (1969 DEC); and 7-302.23(c) (Deferred) (1974 APR), in accordance with 9-107.

Source of Clauses

Regulation under Executive Memorandum 10 October 1963 (28 F.R. 10943); see also Executive Memorandum, 23 August 1971 (36 F.R. 16187).

Purpose of Clauses

To encourage the making and widest use of inventions under Government contracts.

Comment

1. Basic Methods for Implementing the Purpose

To insure that inventions (anything patentable in the United States or any foreign country) get the widest use, the Government may

a. Acquire title to the invention

b. Allow the Contractor to obtain title, subject to the Government's royalty-free license.

c. Defer any decision on patent rights until the invention is disclosed.

2. Factors in Deciding which Method to Use

The Contracting Officer will consult with legal, technical, and patent advisors in order to determine what rights the Government should have in any inventions made under Government contracts. Factors in his determination include:

a. Whether the probable use of the invention is commercial or for the general public welfare.

b. Whether the Contractor is technically competent and capable of commercially using the invention.

c. Whether the Contractor was operating in Government-owned facilities.

d. Whether, in the case of universities, the institution has an acceptable patent policy and is capable of administering inventions in the public interest.

e. Whether, in fields dominated by Government-sponsored research, the Contractor's exclusive right to an invention would be fair to competitors.

3. The Award of Patent Rights

The Contracting Officer, after he has determined how the patent rights will be allocated, will select the patent rights clause appropriate for the contract.

a. **Patent Rights (Title)**

Under this clause, **title** to any invention under the contract must be granted **to the Government** with the Contractor reserving:

publication of such Invention made by or known to the Contractor or of any contemplated publication by the Contractor;

(v) upon request, such duly executed instruments and other papers (prepared by the Government) as are deemed necessary to vest in the Government the rights granted it under this clause and to enable the Government to apply for and prosecute any patent application, in any country, covering such Invention where the Government has the right under this clause to file such application; and

(vi) upon request, an irrevocable power of attorney to inspect and make copies of each United States patent application filed by, or on behalf of, the Contractor covering any such Invention.

(2) With respect to each Subject Invention in which the Contractor has been granted greater rights under paragraph (h) of this clause, the Contractor agrees to provide written reports at reasonable intervals, when requested by the Government as to:

(i) the commercial use that is being made or is intended to be made of such Invention;

(ii) the steps taken by the Contractor to bring the Invention to the point of practical application, or to make the Invention available for licensing.

(d) **Subcontracts.**

(1) The Contractor shall, unless otherwise authorized or directed by the Contracting Officer, include a patent rights clause containing all the provisions of this Patent Rights clause except provision (g) in any subcontract hereunder where a purpose of the subcontract is the conduct of experimental, developmental, or research work. In the event of refusal by a Subcontractor to accept this Patent Rights clause, or if in the opinion of the Contractor this Patent Rights clause is inconsistent with the policy set forth in ASPR 9-107.2 and 9-107.3, the Contractor:

(i) shall promptly submit a written report to the Contracting Officer setting forth the Subcontractor's reasons for such refusal or the reasons Contractor is of the opinion that the inclusion of this clause would be so inconsistent, and other pertinent information which may expedite disposition of the matter; and

(ii) shall not proceed with the subcontract without the written authorization of the Contracting Officer.

The Contractor shall not, in any subcontract or by using such a subcontract as consideration therefor, acquire any rights to Subject Inventions for his own use (as distinguished from such rights as may be required solely to fulfill his contract obligations to the Government in the performance of this contract). Reports, instruments, and other information required to be furnished by a Subcontractor to the Contracting Officer under the provisions of such a patent rights clause in a subcontract hereunder may, upon mutual consent of the Contractor and the Subcontractor (or by direction of the Contracting Officer) be furnished to the Contractor for transmission to the Contracting Officer.

(2) The Contractor, at the earliest practicable date, shall also notify the Contracting Officer in writing of any subcontract containing a patent rights clause, furnish to the Contracting Officer a copy of such subcontract, and notify him when such subcontract is completed. It is understood that the Government is a third party beneficiary of any subcontract clause granting rights to the Government in Subject Inventions, and the Contractor hereby assigns to the Government all the rights that the Contractor would have to enforce the Subcontractor's obligations for the benefit of the Government with respect to Subject Inventions. If there are no subcontracts containing patent rights clauses, a negative report is required. The Contractor shall not be obligated to enforce the agreements of any Subcontractor hereunder relating to the obligations of the Subcontractor to the Government in regard to Subject Inventions.

(e) **Domestic Filing of Patent Applications by Contractor.**

(1) If greater rights are granted in and to a Subject Invention pursuant to paragraph (h) of this clause, the Contractor shall file in due form and within six (6) months of the granting of such greater rights a United States Patent application claiming the Invention referred to in said paragraph, and shall furnish, as soon as practicable, the serial number and filing date of each such application and the patent number of any resulting patent. As to each Invention in which the Contractor has been given greater rights, the Contractor shall notify the Contracting Officer at the end of the six (6) month period if he has failed to file or caused to be filed a patent application covering such invention. If the Contractor has filed or caused to be filed such an application within the six (6) month period, but elects not to continue prosecution of such application, he shall notify the Contracting Officer not less than sixty (60) days before the expiration of the response period. In either of the situations covered by the two immediately-preceding sentences, the Government shall be entitled to all rights, title and interest in such Invention subject to the reservation to the Contractor of a license as specified in paragraph (b).

(2) The following statement shall be included within the first paragraph of any patent application filed and any patent issued on an Invention which was made under Government contract or subcontract thereunder: ''The Invention herein described was made in the course of or under a contract or subcontract thereunder (or grant) with **(here state the Department or Agency)**.''

(f) **Foreign Filing of Patent Applications.**

(1) If the Contractor acquires greater rights in a Subject Invention pursuant to paragraph (h) of this clause and has filed a United States patent application claiming the Invention, the Contractor, or those other than the Government deriving rights from the Contractor, shall as between the parties hereto, have the exclusive right, subject to the rights of the Government under paragraph (i) of this clause, to file applications on the Inventions in each foreign country within:

(i) nine (9) months from the date a corresponding United States patent application is filed;

i. a **nonexclusive, royalty-free** license.

ii. The **right to request** greater rights **IF**

  (a) The invention is not a primary object of the contract, **AND**

  (b) such greater rights are needed to secure the private risk capital needed to make the invention practicable.

b. **Patent Rights (License)**

Under this clause, the Contractor has title to any invention (and its patent) under the contract but agrees:

i. **To grant** the Government an irrevocable, non-exclusive, and royalty-free license throughout the world for Government purposes

ii. **To grant**, upon the Government's request, any applicant

  (a) A non-exclusive, royalty-free license

  IF

the invention has not been brought to practical application within three years of its patent,

OR

  (b) A reasonable royalty or royalty-free license when the invention is:

    (1) Required by Government regulations for public use.

    (2) Necessary to fulfill health needs.

    (3) Otherwise required as stated in the Contract.

iii. **To exclude** (or **refund when included**) royalty charges from contracts with parties using patents developed with Government funds (and therefore covered by its royalty-free license)

c. **Patent Rights (Deferred)**

This clause is used in contracts when it is unclear what the proper division of rights should be. Under it, title to each invention (and its patent) under the contract vests in the Government but the Contractor reserves:

i. A nonexclusive and royalty-free license, and

ii. The right to request greater rights.

d. **Summary of Rights Assured** the Government and the Contractor under **all** the clauses.

i. **The Contractor, at the very least**, will **always** have a non-exclusive and royalty-free license to each of its inventions under the contract.

ii. **The Government**, **at the very least**, will **always** have

  (a) An **irrevocable,** non-exclusive and royalty-free license in the contract invention throughout the world for Government purpose

  AND

  b. The right (under the conditions discussed concerning the license clause above) to require the Contractor to grant further licenses.

4. The Contractor's Duties Under all the Patent Clauses

a. **Invention Disclosure and Reports**

i. Except for obviously unpatentable inventions, the **Contractor must furnish** the Contracting Officer:

  (a) **A written disclosure of each invention** within 6 months after its conception or first use, together with the

    (1) Complete technical details or, if such are not yet available,

    (2) All **known** technical details, to be completed within 3 (6 under the license clause) additional months (unless the Contracting Officer allows a different period).

  (b) **Interim Reports** at least once a year

    (1) **Listing** all patentable inventions developed under the contract during the contract year, or

    (2) **Certifying** that none have been made.

  (c) **A Final Report**

    (1) Listing **all** inventions which have been made under the contract, **OR**

    (2) Certifying that none have been made.

  (d) **Written Reports When Requested**

  IF the Contractor

    (1) Makes an invention under a contract having a "License" clause, **OR**

(ii) six (6) months from the date permission is granted to file foreign applications where such filing has been prohibited for security reasons; or

(iii) such longer period as may be approved by the Contracting Officer.

The Contractor shall notify the Contracting Officer of each foreign application filed and, upon written request of the Contracting Officer, furnish an English translation of such application, and, convey to the Government the entire right, title and interest in the Invention in each foreign country in which an application has not been filed within the time specified above, subject to the reservation of a royalty-free license as specified in paragraph (b).

(2) If the Contractor does not acquire greater rights pursuant to paragraph (h) of this clause and the Government determines not to file a patent application on any Subject Invention (made by the Contractor) in any particular foreign country, the Countracting Officer, upon request of the Contractor, may authorize the Contractor to file a patent application on such Invention in such foreign country and retain ownership thereof, subject to an irrevocable, nonexclusive and royalty-free license to practice and have practiced such Subject Invention throughout the world for Governmental purposes, including the practice of each such Subject Invention (i) in the manufacture, use, and disposition of any article or material, (ii) in the use of any method, or (iii) in the performance of any service, acquired by or for the Government or with funds derived through the Military Assistance Program of the Government or funds otherwise derived through the Government.

(g) Withholding of Payment.

(1) Final Payment under this contract shall not be made before the Contractor delivers to the Contracting Officer the final report required by (c)(1)(iii), all written invention disclosures required by (c)(1)(i), and all information as to subcontracts required by (d)(2).

(2) If at any time before final payment under this contract the Contractor fails to deliver an interim report required by (c)(1)(ii), or a written invention disclosure required by (c)(1)(i), the Contracting Officer shall withhold from payment $50,000 or five percent (5%), of the amount of this contract whichever is less (or whatever lesser sum is available if payments have exceeded ninety-five percent (95%) of the amount of this contract) until the Contractor corrects all such failures.

(3) After payments total eighty percent (80%) of the amount of this contract, and if no amount is required to be withheld under (2) above, the Contracting Officer may, if he deems such action warranted because of the Contractor's performance under the Patent Rights clause of this contract or other known Government contracts, withhold from payment such sum as he considers appropriate, not exceeding $50,000 or five percent (5%), of the amount of this contract whichever is less, to be held as a reserve until the Contractor delivers all the reports, disclosures, and information specified in (1) above. Subject to the five percent (5%) or $50,000 limitation, the sum withheld under this subparagraph (3) may be increased or decreased from time to time at the discretion of the Contracting Officer.

(4) No amount shall be withheld under this paragraph (g) while the amount specified by this paragraph is being withheld under other provisions of this contract. The total amount withheld under (1), (2) and (3) above shall not exceed $50,000 or five percent (5%), of the amount of this contract whichever is less. The withholding of any amount or subsequent payment thereof to the Contraactor shall not be construed as a waiver of any rights accruing to the Government under this contract. This paragraph shall not be construed as requiring the Contractor to withhold any amounts from a Subcontractor to enforce compliance with the patent provision of a subcontract. As used in this paragraph (g), ''this contract'' means ''this contract as from time to time amended.'' In cost-type contracts, ''amount of this contract'' means ''estimated cost of this contract.''

(h) **Contractor's Request for Greater Rights.** The Contractor at the time of first disclosing a Subject Invention pursuant to paragraph (c)(1)(i) of this clause, but not later than three (3) months thereafter, may submit in writing to the Contracting Officer, in accordance with applicable regulations, a request for greater rights than the license reserved to the Contractor in paragraph (b) of this clause if:

(i) the invention is not the primary object of this contract; and

(ii) the acquisition of such greater rights is consistent with the intent of ASPR 9-107.3(a) and is necessary to call forth private risk capital and expense to bring the Invention to the point of practical application.

The Contracting Officer will review the Contractor's request for greater rights and will notify the Contractor whether such request is granted in whole or in part. Any rights granted to the Contractor shall be subject to, but not necessarily limited to, the provisions of paragraph (i) of this clause.

(i) **Reservation of Rights to the Government.**

(1) In the event greater rights in any Subject Invention are vested in or granted to the Contractor pursuant to paragraph (h) above, such greater rights shall, as a minimum, be subject to an irrevocable, nonexclusive and royalty-free license to practice and have practiced each such Subject Invention (made by the Contractor) throughout the world for Governmental purposes, and including the practice of each such Subject Invention (i) in the manufacture, use, and disposition of any article or material, (ii) in the use of any method, or (iii) in the performance of any service, acquired by or for the Government or with funds derived through the Military Assistance Program of the Government or funds otherwise derived through the Government.

(2) In the event greater rights are vested in the Contractor, the Contractor further agrees to and does hereby grant to the Government the right to require the granting of a license to an applicant under any such Invention:

(2) Acquires greater rights in an invention under a contract having the ''Title'' or ''Deferred'' clauses

THEN, when requested by the Government, it must provide written reports as to the:

(1) Present or intended commercial use of such invention under the contract

(2) Steps taken to

(a) Bring such invention to the point of practical application.

(b) Make such invention available for licensing.

ii. **The Government** may duplicate and disclose any of the disclosures and reports which the Contractor makes under this clause.

iii. **Penalties for Failure to Disclose or Report**

a. The Contracting Officer will **withhold payment**

IF

i. the Contractor fails to

(a) Disclose an Invention

(b) File an Interim Report

THEN

the Contracting Officer must withhold the **lesser** of

(a) $50,000 or

(b) 5% of the contract's estimated cost.

IF

ii. the Contractor has violated the patent rights clause in this or other Government contracts

THEN

the Contracting Officer, after 80% of the contract's estimated cost has been paid, **may withhold** up to the lesser of

(a) $50,000, or

(b) 5% of the contract's estimated cost

As insurance that the Contractor will provide the required information.

iii. **No final payment** under the contract may be paid **until** the Contractor delivers

(a) All the required invention disclosures

(b) The Final Invention Report.

b. The Contractor **forfeits its rights** in inventions **IF** the Contractor fails to report any invention under the contract to the Contracting Officer **at or prior to the time** it either

i. Files a United States or foreign patent application, **OR**

ii. Submits its Final Report, **whichever is later**.

THEN the Contractor

i. **Forfeits** to the Government **all** of its rights in any such invention under the contract **unless** the Contractor

(a) Contends that its invention is **not** an invention under the contract and discloses the reasons for its belief, **OR**

(b) Failed to report because of causes beyond its control.

ii. **Holds** any such forfeited invention and its related patent applications, and patents **in trust** for the Government until it receives a written assignment of the invention.

c. The Government may also pursue any other remedies available to it under the contract (see e.g. the ''Terminations'' clause).

b. **Examination of the Contractor's Records**

The Contracting Officer (or his authorized representative) has the right, **until three years after** the final contract payment to examine:

i. The Contractor's books, records, and documents

ii. Any other of its supporting data which is deemed by the Contracting Officer (or his authorized representative) to be directly pertinent.

(a) To the discovery or identification of inventions under the contract, **OR**

(b) To compliance with this clause (see also; the ''Examination of Records'' clause).

c. **Filing of Domestic Patent Applications**

i. The **RIGHT** to file.

K-8 (i) on a nonexclusive, royalty-free basis, unless the Contractor, his licensee, or his assignee demonstrates to the Government, at its request, that effective steps have been taken within three (3) years after a patent issues on such Invention to bring the Invention to the point of practical application or that the Invention has been made available for licensing royalty-free or on terms that are reasonable in the circumstances, or can show cause why the title should be retained for a further period of time; or

(ii) royalty-free or on terms that are reasonable in the circumstances to the extent that the Invention is required for public use by Governmental regulations or as may be necessary to fulfill health needs, or for other public purposes stipulated in the Schedule of this contract.

(j) **Right to Disclose Subject Inventions.** The Government may duplicate and disclose reports and disclosures of Subject Inventions required to be furnished by the Contractor pursuant to this Patent Rights clause.

(k) **Forfeiture of Rights in Unreported Subject Inventions.** The Contractor shall forfeit to the Government all rights in any Subject Invention which he fails to report to the Contracting Officer at or prior to the time he (i) files or causes to be filed a United States or foreign application thereon, or (ii) submits the final report required by (c)(iii) of this clause, whichever is later, **provided** that the Contractor shall not forfeit rights in a Subject Invention if (A) contending that the invention is not a Subject Invention, he nevertheless reports the invention and all the facts pertinent to his contention to the Contracting Officer within the time specified in (i) or (ii) above, or (B) he establishes that the failure to report was due entirely to causes beyond his control and without his fault or negligence. The Contractor shall be deemed to hold any such forfeited Subject Invention, and the patent applications and patents pertaining thereto, in trust for the Government pending written assignment of the Invention. The rights accruing to the Government under this paragraph shall be in addition to and shall not supersede any other rights which the Government may have in relation to unreported Subject Inventions. Nothing contained herein shall be construed to require the Contractor to report any invention which is not in fact a Subject Invention.

(l) **Examination of Records Relating to Inventions.** The Contracting Officer, or his authorized representative shall, until the expiration of three (3) years after final payment under this contract, have the right to examine any books, records, documents, and other supporting data of the Contractor which the Contracting Officer or his authorized representative shall reasonably deem directly pertinent to the discovery or identification of Subject Inventions or to compliance by the Contractor with the requirements of this clause.

(End of clause)

PATENT RIGHTS (LICENSE) (1969 DEC)

(a) **Definitions Used in This Clause.**

(1) **Subject Invention** means any Invention or discovery, whether or not patentable, conceived or first actually reduced to practice in the course of or under this contract. The term ''Subject Invention'' includes, but is not limited to, any art, method, process, machine, manufacture, design or composition of matter, or any new and useful improvement thereof, or any variety of plant, which is or may be patentable under the patent laws of the United States of America or any foreign country.

(2) **Government purpose** means the right of the Government of the United States (including any agency thereof, state or domestic municipal government) to practice and have practiced (make or have made, use or have used, sell or have sold) any Subject Invention throughout the world by or on behalf of the Government of the United States.

(3) **Contract** means any contract, agreement, grant, or other arrangement, or subcontract entered into with or for the benefit of the Government where a purpose of the contract is the conduct of experimental, developmental, or research work.

(4) **Subcontract and Subcontractor** mean any subcontract or Subcontractor of the Contractor, any lower-tier subcontract or Subcontractor under this contract.

(5) **To bring to the point of practical application** means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine or system and, in each case, under such conditions as to establish that the Invention is being worked and that its benefits are reasonably accessible to the public.

(b) **Rights Granted to the Government.**

(1) The Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, and royalty-free license to practice and have practiced each Subject Invention (made by the Contractor) throughout the world for Government purposes, and including the practice of each such Subject Invention (i) in the manufacture, use, and disposition of any article or material, (ii) in the use of any method, or (iii) in the performance of any service, acquired by or for the Government or with funds derived through the Military Assistance Program of the Government or funds otherwise derived through the Government.

(2) The Contractor further agrees to grant, upon the request of the Government, a license under any Subject Invention (made by the Contractor) to:

(i) any applicant on a nonexclusive, royalty-free basis, unless the Contractor, his licensee, or his assignee

The Contractor may file a United States Patent Application on an invention under the contract **IF**

a. The Contractor **elects** to file (under the ''License'' clause); such an election must be made at the same time that the written disclosure of the invention is furnished to the Contracting Officer

b. The Contracting Officer grants the Contractor greater rights **allowing it** to file such an application (under the ''Title'' and ''Deferred'' clauses).

ii. **Filing** the Application — Contractor's Duties **IF** the Contractor elects or is allowed to file a Domestic Patent Application,

THEN the Contractor must

a. **File** the application within six months (an extension is allowed **only** under the ''License'' clause).

b. **Acknowledge** the Sponsoring Agency in **both** its patent application and any issued patent (in the form to be specified in the contract).

c. **Furnish** (under the ''Title'' and ''Deferred'' clauses), as soon as practicable,

- i. The serial number and filing date of each such application.
- ii. The patent number of any resulting patent.

d. Under the ''License'' Clause,

- i. **Notify** the Contracting Officer of such filing
- ii. **Deliver** to the Contracting Officer within two (2) months of either the filing or the first written disclosure of such invention (whichever is later) **a license** confirming the Government's right in the invention.
- iii. **Submit** to the Contracting Officer within six (or longer if authorized) months
  - a. A copy of the patent application or
  - b. All technical detail necessary to complete its written disclosure of the invention.

3. **Non-filing**

IF

the Contractor elects not to file or does not file or cause a patent application to be filed within the six month period (or such longer period if authorized under the ''License'' clause)

THEN

a. The Contractor must **notify** the Contracting Officer of such

- i. **Within** the six month (or authorized longer period) under the ''License'' clause, **OR**
- ii. **At the end** of the six month period under the ''Title'' and ''Deferred'' clauses.

b. The Government gets all right, title, and interest in the Contractor's invention (subject to the Contractor's non-exclusive and royalty-free license).

- i. **Automatically** under the ''Title'' and ''Deferred'' clauses.
- ii. **Upon written request,** under the ''License'' clause.

4. **Discontinued Applications**

IF

the Contractor has filed a patent application but decides **to discontinue** processing its application

THEN

a. The Contractor must notify the Contracting Officer **at least** sixty (60) days before the end of its application response period.

b. The Government gets all right, title, and interest in the Contractor's invention in the same manner as it would in a case of non-filing.

d. **Filing a Foreign Patent Application**

1. The **exclusive** right to file.

The Contractor has the **exclusive right** to file a patent application on an invention under the contract in a foreign country **IF**

a. The Contractor so chooses, (under the ''License'' clause), **OR**

b. The Contractor

- i. Has greater rights allowing it to file such an application **AND**
- ii. Has filed a United States Patent Application claiming the invention (under the ''Title'' and ''Deferred'' clauses).

demonstrates to the Government, at its request, that effective steps have been taken within three years after a patent issues on such Invention to bring the Invention to the point of practical application or that the Invention has been made available for licensing royalty-free or on terms that are reasonable in the circumstances, or can show cause why the principal or exclusive rights should be retained for a further period of time;

(ii) any applicant royalty-free or on terms that are reasonable in the circumstances to the extent that the Invention is required for public use by governmental regulations or as may be necessary to fulfill health needs, or for other public purposes stipulated in the schedule of this contract.

Nothing contained in this Patent Rights clause shall be deemed to grant any rights with respect to any invention other than a Subject Invention.

(c) **Invention Disclosures and Reports.** With respect to Subject Inventions (made by the Contractor), except those which are obviously unpatentable under the patent laws of the United States, the Contractor shall furnish to the Contracting Officer:

(i) a written disclosure of each such Invention within six (6) months after conception or first actual reduction to practice, whichever occurs first under this contract, sufficiently complete in technical detail to convey to one skilled in the art to which the Invention pertains a clear understanding of the nature, purpose, operation, and to the extent known, the physical, chemical, or electrical characteristics of the Invention, together with a written statement making an election as to whether a United States patent application claiming the Invention will be filed by or on behalf of the Contractor; **provided,** where the Contractor elects to file but is unable to submit a complete disclosure, the Contractor shall within said six (6) months period submit a disclosure which includes all such technical detail then known to him and shall within six (6) months after his election to file (or such longer period as may be authorized by the Contracting Officer under (d)(i) below), submit all other technical detail necessary to complete the disclosure or a copy of the patent application;

(ii) interim reports at least every twelve (12) months, the initial period of which shall commence with the date of this contract, each report listing all such Inventions conceived or first actually reduced to practice more than six (6) months prior to the date of the report and not listed on a prior interim report, or certifying that there are no such unreported Inventions;

(iii) prior to final settlement of this contract, a final report listing all such Inventions including all those previously listed in interim reports, or certifying that there are no such unreported Inventions (This Final Report and any Interim Report under (ii) above shall be submitted on DD Form 882 or other format acceptable to the Contracting Officer); and

(iv) written reports at reasonable intervals, prior to and after final settlement, when requested by the Government as to

(A) The commercial use that is being made or is intended to be made of such Invention;

(B) the steps taken by the Contractor to bring the Invention to the point of practical application, or to make the Invention available for licensing.

(d) **Domestic Filing.** In connection with each Subject Invention referred to in (c)(i) above:

(i) if the Contractor has elected to file a United States patent application claiming such Invention, the Contractor shall, within six (6) months after the election (or such longer period, not to exceed one (1) year after such election, as may be authorized by the Contracting Officer), file or cause to be filed such application in due form, shall notify the Contracting Officer of such filing, and shall deliver to the Contracting Officer, within two (2) months after such filing or within two (2) months of the first written disclosure of such invention if a patent application previously has been filed, a duly executed license, in triplicate, fully confirmatory of all rights to which the Government is entitled under this clause; if the Contractor does not file or cause to be filed such application, he shall so notify the Contracting Officer within the six (6) month period or such longer period as may be authorized above.

(ii) the following statement shall be included within the first paragraph of the specification of any patent application filed and any patent issued on an invention which was made under a Government contract or subcontract thereunder: ''The Invention herein described was made in the course of or under a contract or subcontract thereunder, (or grant) with **(here state the Department or Agency).** ''

(iii) if the Contractor has elected not to file or to cause to be filed a United States patent application claiming such Invention, or has made the contrary election but has not filed or caused to be filed such application within six (6) months after the election or such longer period as may be authorized above, the Contractor shall:

(A) inform the Contracting Officer in writing, as soon as practicable, of the date and identity of any public use, or publication of such Invention made by or known to the Contractor or of any contemplated publication by the Contractor;

(B) upon written request, convey to the Government the Contractor's entire right, title and interest in such Invention by delivering to the Contracting Officer such duly executed instruments (prepared by the Government) of assignment and application, and such other papers as are deemed necessary to vest in the Government the entire right, title, and interest aforesaid, and the right to apply for and prosecute patent applications covering such Invention throughout

2. **Limitation** on the Exclusive Right to File

   The Contractor will have such an exclusive right to file **only** until

   a. Nine months from the filing date of the corresponding United States Patent Application, **OR**

   b. Six months from the date that permission to file a foreign application is granted — where such filings had previously been prohibited for security reasons.

   c. Any longer period **approved by** the Contracting Officer

   d. Nine months from the date the Contractor disclosed its invention and elected not to file a United States Application (**only** under the ''License'' clause).

3. The Contractor's Duties Regarding Foreign Patent Applications

   The Contractor must

   a. Notify the Contracting Officer of each foreign patent application filed, **and**

   b. Obey the Contracting Officer's **written request** to

      i. Furnish an English translation of each such foreign patent application, **AND/OR**,

      ii. Convey to the Government the entire right, title, and interest in each invention under the contract in each country where it fails to file the application within the time limits specified above (subject to the usual license to be retained by the Contractor).

4. Additional Filing Opportunities Under the ''Title'' and ''Deferred'' Clauses

   Even though the Contractor does not get greater rights in its invention under the contract,

   IF

   the Government decides not to file a patent application on the invention in a particular foreign country

   THEN

   the Contracting Officer (if requested) may authorize the Contractor to file such a patent application in that country (subject to the Government's usual license).

e. **The Contractor's Additional Duties**

   IF

   the Contractor

   1. Has made an invention under the contract (under the ''Title'' and ''Deferred'' Clauses) **OR**

   2. Has either elected not to file or has not filed its patent application within the required period (under the ''License'' Clause).

   THEN

   The Contractor must

   1. **Inform** the Contracting Officer **in writing** as soon as practicable, of

      a. The date and identity of any public use, sale or publication of such an invention which it makes or of which it knows.

      b. Any such publication which it contemplates.

   2. **Furnish** the Contracting Officer, **upon written request**

      a. Instruments or other papers necessary to vest in the Government

         i. All right, title, and interest in the invention

         ii. The right to apply for and process any patent application through the world.

         (Subject to the usual Contractor's License)

      b. An irrevocable power of attorney to inspect and make copies of each United States patent application made by or for the Contractor.

Flow Down

1. **Conditions for Required Flow Down**

   Unless otherwise directed by the Contracting Officer, the Contractor must include the **same** patent rights clause in the subcontract as was in its contract **IF** a purpose of the subcontract is to conduct experimental, developmental, or research work.

   IF

   a. The Contractor and Subcontractor mutually agree, **OR**

   b. The Contracting Officer so directs

   THEN

   Reports, instruments, or other information which the Subcontractor is required (under the Patent Rights the world, subject to the reservation of a nonexclusive and royalty-free license to the Contractor (and to his existing and future associated and affiliated companies, if any, within the corporate structure of which the Contractor is a part) which license shall be assignable to the successor of that part of the Contractor's business to which such Invention pertains;

(iv) the Contractor shall furnish promptly to the Contracting Officer on request an irrevocable power of attorney to inspect and make copies of each United States patent application filed by or on behalf of the Contractor covering any such Invention; and

(v) in the event the Contractor, or those other than the Government deriving rights from the Contractor, elects not to continue prosecution of any such United States patent application filed by or on behalf of the Contractor, the Contractor shall so notify the Contracting Officer not less than sixty (60) days before the expiration of the response period and, upon written request, deliver to the Contracting Officer such duly executed instruments (prepared by the Government) as are deemed necessary to vest in the Government the entire right, title, and interest in such Invention and the application, subject to the reservation as specified in paragraph (d)(iii)(B) of this clause.

(e) **Foreign Filing.** The Contractor, or those other than the Government deriving rights from the Contractor, shall as between the parties hereto, have the exclusive right, subject to the rights of the Government under paragraph (b) of this clause, to file applications on Subject Inventions (made by the Contractor) in each foreign country within:

(i) nine (9) months from the date a corresponding United States application is filed, or nine (9) months from the date the Contractor discloses a Subject Invention under paragraph (c)(i) above with an election not to file a United States application:

(ii) six (6) months from the date permission is granted to file foreign applications where such filing had been prohibited for security reasons; or

(iii) such longer period as may be approved by the Contracting Officer.

The Contractor shall notify the Contracting Officer of each foreign application filed and, upon written request of the Contracting Officer, furnish an English translation of such foreign application, and convey to the Government the entire right, title, and interest in each such Subject Invention in each foreign country in which an application has not been filed within the time above specified, subject to the reservation as specified in paragraph (d)(iii)(B) of this clause.

(f) **Withholding of Payment.**

(1) Final payment under this contract shall not be made before the Contractor delivers to the Contracting Officer the final report required by (c)(iii), all written Invention disclosures required by (c)(i), all confirmatory licenses required by (d)(i), and all information as to subcontracts required by (g).

(2) If at any time before final payment under this contract the Contractor fails to deliver an interim report required by (c)(ii), a written Invention disclosure required by (c)(i), or a confirmatory license required by (d)(i), the Contracting Officer shall withhold from payment $50,000 or five percent (5%) of the amount of this contract whichever is less (or whatever lesser sum is available if payments have exceeded ninety-five percent (95%) of the amount of this contract) until the Contractor corrects all such failures.

(3) After payments total eighty percent (80%) of the amount of this contract, and if no amount is required to be withheld under (2) above, the Contracting Officer may, if he deems such action warranted because of the Contractor's performance under the Patent Rights clause of this contract or other known Government contracts, withhold from payment such sum as he considers appropriate, not exceeding $50,000 or five percent (5%), of the amount of this contract, whichever is less, to be held as a reserve until the Contractor delivers all the reports, disclosures, licenses, and information specified in (1) above. Subject to the five percent (5%) or $50,000 limitation, the sum withheld under this subparagraph (3) may be increased or decreased from time to time at the discretion of the Contracting Officer.

(4) No amount shall be withheld under this paragraph (f) while the amount specified by this paragraph is being withheld under other provisions of this contract. The total amount withheld under (1), (2) and (3) above shall not exceed $50,000 or five percent (5%) of the amount of this contract whichever is less. The withholding of any amount or subsequent payment thereof to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract. This paragraph shall not be construed as requiring the Contractor to withhold any amounts from a Subcontractor to enforce compliance with the patent provision of a subcontract. As used in this paragraph (f), ''this contract'' means ''this contract as from time to time amended.'' In cost-type contracts, ''amount of this contract'' means ''estimated cost of this contract.''

(g) **Subcontracts.**

(1) The Contractor shall, unless otherwise authorized or directed by the Contracting Officer, include a patent rights clause containing all of the provisions of this Patent Rights clause except provision (f) in any subcontract hereunder where a purpose of the subcontract is the conduct of experimental, developmental, or research work. In the event of refusal by a Subcontractor to accept this Patent Rights clause, or if in the opinion of the Contractor this Patent Rights clause is inconsistent with the policy set forth in ASPR 9-107.2 and 9-107.3, the Contractor:

(i) shall promptly submit a written report to the Contracting Officer setting forth the Subcontractor's reason for such refusal or the reasons the Contractor is of the opinion that the inclusion of this clause would be so inconsistent, and other pertinent information which may expedite disposition of the matter; and clause) to submit to the Contracting Officer will be furnished to the Contractor for transmission to the Contracting Officer.

2. **Contesting Flow Down**
   IF
   a. The Subcontractor refuses to accept the Patent Rights clause **OR**
   b. The Contractor thinks including the clause is inconsistent with United States Patent Policy
   THEN the Contractor
   a. Must submit a **written** report to the Contracting Officer setting forth
      i. The Subcontractor 's reasons for refusal
      ii. The Contractor 's reasons for its belief that the clause is inconsistent with U.S. patent policy.
      iii. Other pertinent information which may aid in disposing the matter.
   b. **May not proceed** with the subcontract without the **written** authorization of the Contracting Officer.
3. **Basic Contractor Duties**
   The Contractor must
   a. **Provide** the Contracting Officer with
      i. **Written** notice of any subcontract containing a ''Patent Rights'' clause
      ii. **A copy** of any such subcontract
      iii. Notice of the completion of any such subcontract
      iv. **A report** when no such subcontracts are made under the contract.
   b. **Assign** to the Government **all rights and duties** which it would have to enforce the Subcontractor 's obligations benefitting the Government with respect to the invention under the contract.
4. **Nonrequirements and Prohibitions**
   The Contractor
   a. **Is not required** to withhold any payments from a Subcontractor in order to enforce compliance with a subcontract patent provision
   b. **Is not permitted** to use subcontracts to acquire patent rights for itself.

Special Notes

1. **Withholding of Payments**
   a. The maximum total amount which may be withheld under the ''Patent Rights'' clauses is
      i. $50,000, **OR**
      ii. 5% of the contract 's estimated cost whichever is less
   b. **IF** such a maximum amount is being withheld under **any other** provisions of the contract **THEN NO** amount may be withheld under the Patent Rights clauses
   c. **IF**, under the ''License'' clause, the Contractor
      i. Discloses an invention under the contract, **OR**
      ii. Files for a United States patent application **AND**
      iii. Does not deliver to the Contracting Officer within the next two months a **License** confirming the Government 's right to the invention
      THEN the Contracting Officer may
      i. Withhold payment or
      ii. Delay final payment as provided in the ''withholding of payment'' paragraph.
   d. In contracts with educational institutions the ''withholding of payment'' paragraph **may be omitted.**
2. **The Process** of acquiring greater rights (under the ''Title'' and ''Deferred'' clauses)

The Contractor must submit a **written request** to the Contracting Officer for greater rights than those reserved to it by the usual license.

   a. At the time when first disclosing the invention under the contract, **OR**
   b. Within three (3) months of such disclosure

Under the ''Deferred'' clause, such a request must include (at least) information concerning the Contractor 's intention and plans to bring the invention to the point of commercial application.

IF

3. an educational institution has a definite, established policy **approved** by its governing body **and** by the Department of Defense of

(ii) shall not proceed with the subcontract without the written authorization of the Contracting Officer. The Contractor shall not, in any subcontract or by using such a subcontract as consideration therefor, acquire any rights to Subject Inventions for his own use (as distinguished from such rights as may be required solely to fulfill his contract obligations to the Government in the performance of this contract). Reports, instruments, and other information required to be furnished by a Subcontractor to the Contracting Officer under the provisions of such a patent rights clause in a subcontract hereunder may, upon mutual consent of the Contractor and the Subcontractor (or by direction of the Contracting Officer) be furnished to the Contractor for transmission to the Contracting Officer.

(2) The Contractor, at the earliest practicable date, shall also notify the Contracting Officer in writing of any subcontract containing a patent rights clause, furnish to the Contracting Officer a copy of such subcontract, and notify him when such subcontract is completed. It is understood that the Government is a third party beneficiary of any subcontract clause granting rights to the Government in Subject Inventions, and the Contractor hereby assigns to the Government all the rights that he would have to enforce the Subcontractor's obligations for the benefit of the Government with respect to Subject Inventions. If there are no subcontracts containing patent rights clauses, a negative report is required. The Contractor shall not be obligated to enforce the agreements of any Subcontractor hereunder relating to the obligations of the Subcontractor to the Government in regard to Subject inventions.

(h) **Licenses Granted by Contractor to Others Subject to Government's Rights.** The Contractor recognizes that the Government, or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for royalties for the use of a Subject Invention on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for use of patents in which the Government holds a royalty-free license. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(i) **Rights to Disclose Subject Inventions.** The Government may duplicate and disclose reports and disclosures of Subject Inventions required to be furnished by the Contractor or a Subcontractor pursuant to this Patent Rights clause.

(j) **Forfeiture of Rights in Unreported Subject Inventions.** The Contractor shall forfeit to the Government all rights in any Subject Invention which he fails to report to the Contracting Officer at or prior to the time he (i) files or causes to be filed a United States or foreign application thereon, or (ii) submits the final report required by (c)(iii) of this clause, whichever is later, **provided,** that the Contractor shall not forfeit rights in a Subject Invention if (A) contending that the invention is not a Subject Invention, he nevertheless reports the invention and all facts pertinent to his contention to the Contracting Officer within the time specified in (i) or (ii) above, or (B) he establishes that the failure to report was due entirely to causes beyond his control and without his fault or negligence. the Contractor shall be deemed to hold any such forfeited Subject Invention, and the patent applications and patents pertaining thereto, in trust for the Government pending written assignment of the invention. The rights accruing to the Government under this paragraph shall be in addition to and shall not supersede any other rights which the Government may have in relation to unreported Subject Inventions. Nothing contained herein shall be construed to require the Contractor to report any invention which is not in fact a Subject Invention.

(k) **Examination of Records Relating to Inventions.** The Contracting Officer or his authorized representative shall, until the expiration of three (3) years after final payment under this contract, have the right to examine any books, records, documents, and other supporting data of the Contractor which the Contracting Officer or his authorized representative shall reasonably deem directly pertinent to the discovery or identification of Subject Inventions or to compliance by the Contractor with the requirements of this clause.

PATENT RIGHTS (DEFERRED) (1974 APR)

(a) **Definitions Used in This Clause.**

(1) **Subject Invention** means any invention or discovery, whether or not patentable, conceived or first actually reduced to practice in the course of or under this contract. The term "Subject Invention" includes, but is not limited to, any art, method, process, machine, manufacture, design or composition of matter, or any new and useful improvement thereof, or any variety of plant, which is or may be patentable under the patent laws of the United States of America or any foreign country.

(2) **Governmental purpose** means the right of the Government of the United States (including any agency thereof, state or domestic municipal government) to practice and have practiced (make or have made, use or have used, sell or have sold) any Subject Invention throughout the world by or on behalf of the Government of the United States.

(3) **Contract** means any contract, agreement, grant, or other arrangement, or subcontract entered into with or for the benefit of the Government where a purpose of the contract is the conduct of experimental, developmental, or research work.

(4) **Subcontract and Subcontractor** means any subcontract or Subcontractor of the Contractor, any lower-tier subcontract or Subcontractor under this contract.

a. Retaining title to inventions made by its employees, **OR**

b. Requiring its employees to assign title to such inventions to a patent holding entity for the benefit of the institution

THEN

United States Patent Policy may be best served by permitting the institution (as Contractor) to acquire greater rights than the normal license **at the time the contract is entered into.**

4. Contracts for research relating to space, in atomic energy, or under NASA have their own individual patent rights clauses, as required by regulations and statutes (see 42 U.S.C. §§ 2457, 1871 (1970); 15 U.S.C. § 2054 (1972 Supp).

5. The FPR has promulgated a patents section (1-9.1) but its effective date has been indefinitely suspended as the result of a lawsuit entitled **Public Citizen, Inc., et al v Arthur F. Sampson, Administrator General Services Administration**, in the United States District Court for the District of Columbia, #781-73 (17 January 1974) (39 F.R. 7925).

K-8 (5) **To bring to the point of practical application** means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine or system, and in each case, under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public.

(b) **Rights Granted to the Government.** Except as provided in (e) and (h) of this clause, the Contractor agrees to grant the Government all right, title and interest in and to each Subject Invention (made by the Contractor), subject to the reservation of a nonexclusive and royalty-free license to the Contractor. The license shall extend to existing and future associated and affiliated companies, if any, within the corporate structure of which the Contractor is a part and shall be assignable to the successor of that part of the Contractor's business to which such Invention pertains. Nothing contained in this Patent Rights clause shall be deemed to grant any rights with respect to any invention other than a Subject Invention.

(c) **Invention Disclosures and Reports.**

(1) With respect to Subject Inventions (made by the Contractor), except those which are obviously unpatentable under the patent laws of the United States, the Contractor shall furnish to the Contracting Officer:

(i) a written disclosure of each invention within six (6) months after conception or first actual reduction to practice, whichever occurs first under this contract, sufficiently complete in technical detail to convey to one skilled in the art to which the Invention pertains a clear understanding of the nature, purpose, operation, and to the extent known the physical, chemical, or electrical characteristics of the invention; when unable to submit a complete disclosure, the Contractor shall within said six (6) month period submit a disclosure which includes all such technical detail then known to him and shall, unless the Contracting Officer authorizes a different period, submit all other technical detail necessary to complete the disclosure within three (3) months of the expiration of said six (6) month period.

(ii) interim reports at least every twelve (12) months, the initial period of which shall commence with the date of this contract, each report listing all such Inventions conceived or first actually reduced to practice more than six (6) months prior to the date of the report and not listed on a prior interim report, or certifying that there are no such unreported Inventions;

(iii) prior to final settlement of this contract, a final report listing all such Inventions including all those previously listed in interim reports, or certifying that there are no such unreported Inventions (This Final Report and any Interim Report under (ii) above shall be submitted on DD Form 882 or other format acceptable to the Contracting Officer.);

(iv) information in writing, as soon as practicable, of the date and identity of any public use, sale, or publication of such Invention made by or known to the Contractor or of any contemplated publication by the Contractor;

(v) upon request, such duly executed instruments and other papers (prepared by the Government) as are deemed necessary to vest in the Government the rights granted it under this clause and to enable the Government to apply for and prosecute any patent application, in any country, covering such Invention where the Government has the right under this clause to file such application; and

(vi) upon request, an irrevocable power of attorney to inspect and make copies of each United States patent application filed by, or on behalf of, the Contractor covering any such Invention.

(2) With respect to each Subject Invention in which the Contractor has been granted greater rights under paragraph (h) of this clause, the Contractor agrees to provide written reports at reasonable intervals, when requested by the Government as to:

(i) the commercial use that is being made or is intended to be made of such Invention;

(ii) the steps taken by the Contractor to bring the Invention to the point of practical application, or to make the Invention available for licensing.

(d) **Subcontracts.**

(1) The Contractor shall, unless otherwise authorized or directed by the Contracting Officer, include a patent rights clause containing all the provisions of this Patent Rights clause except provision (g) in any subcontract hereunder where a purpose of the subcontract is the conduct of experimental, developmental, or research work. In the event of refusal by a Subcontractor to accept this Patent Rights clause, or if in the opinion of the Contractor this Patent Rights clause is inconsistent with the policy set forth in ASPR 9-107.2 and 9-107.3, the Contractor:

(i) shall promptly submit a written report to the Contracting Officer setting forth the Subcontractor's reasons for such refusal or the reasons Contractor is of the opinion that the inclusion of this clause would be so inconsistent, and other pertinent information which may expedite disposition of the matter; and

(ii) shall not proceed with the subcontract without the written authorization of the Contracting Officer.

The Contractor shall not, in any subcontract or by using such a subcontract as consideration therefor, acquire any rights to Subject Inventions for his own use (as distinguished from such rights as may be required solely to fulfill his contract obligations to the Government in the performance of this contract). Reports, instruments, and other information required to be furnished by a Subcontractor to the Contracting Officer under the provisions of such a patent rights clause in a subcontract hereunder may, upon mutual consent of the Contractor and the Subcontractor (or

K-8 by direction of the Contracting Officer) be furnished to the Contractor for transmission to the Contracting Officer.

(2) The Contractor, at the earliest practicable date, shall also notify the Contracting Officer in writing of any subcontract containing a patent rights clause, furnish to the Contracting Officer a copy of such subcontract, and notify him when such subcontract is completed. It is understood that the Government is a third party beneficiary of any subcontract clause granting rights to the Government in Subject Inventions, and the Contractor hereby assigns to the Government all the rights that the Contractor would have to enforce the Subcontractor's obligations for the benefit of the Government with respect to Subject Inventions. If there are no subcontracts containing patent rights clauses, a negative report is required. The Contractor shall not be obligated to enforce the agreements of any Subcontractor hereunder relating to the obligations of the Subcontractor to the Government in regard to Subject Inventions.

(e) **Domestic Filing of Patent Applications by Contractor.**

(1) If greater rights are granted in and to a Subject Invention pursuant to paragraph (h) of this clause, the Contractor shall file in due form and within six (6) months of the granting of such greater rights a United States Patent application claiming the Invention referred to in said paragraph, and shall furnish, as soon as practicable, the serial number and filing date of each such application and the patent number of any resulting patent. As to each Invention in which the Contractor has been given greater rights, the Contractor shall notify the Contracting Officer at the end of the six (6) month period if he has failed to file or caused to be filed a patent application covering such invention. If the Contractor has filed or caused to be filed such an application within the six (6) month period, but elects not to continue prosecution of such application, he shall notify the Contracting Officer not less than sixty (60) days before the expiration of the response period. In either of the situations covered by the two immediately-preceding sentences, the Government shall be entitled to all rights, title and interest in such Invention subject to the reservation to the Contractor of a license as specified in paragraph (b).

(2) The following statement shall be included within the first paragraph of any patent application filed and any patent issued on an Invention which was made under Government contract or subcontract thereunder: "The Invention herein described was made in the course of or under a contract or subcontract thereunder (or grant) with **(here state the Department or Agency).**"

(f) **Foreign Filing of Patent Applications.**

(1) If the Contractor acquires greater rights in a Subject Invention pursuant to paragraph (h) of this clause and has filed a United States patent application claiming the Invention, the Contractor, or those other than the Government deriving rights from the Contractor, shall as between the parties hereto, have the exclusive right, subject to the rights of the Government under paragraph (i) of this clause, to file applications on the Inventions in each foreign country within:

(i) nine (9) months from the date a corresponding United States patent application is filed;

(ii) six (6) months from the date permission is granted to file foreign applications where such filing has been prohibited for security reasons; or

(iii) such longer period as may be approved by the Contracting Officer.

The Contractor shall notify the Contracting Officer of each foreign application filed and, upon written request of the Contracting Officer, furnish an English translation of such application, and, convey to the Government the entire right, title and interest in the Invention in each foreign country in which an application has not been filed within the time specified above, subject to the reservation of a royalty-free license as specified in paragraph (b).

(2) If the Contractor does not acquire greater rights pursuant to paragraph (h) of this clause and the Government determines not to file a patent application on any Subject Invention (made by the Contractor) in any particular foreign country, the Contracting Officer, upon request of the Contractor, may authorize the Contractor to file a patent application on such Invention in such foreign country and retain ownership thereof, subject to an irrevocable, nonexclusive and royalty-free license to practice and have practiced such Subject Invention throughout the world for Governmental purposes, including the practice of each such Subject Invention (i) in the manufacture, use, and disposition of any article or material, (ii) in the use of any method, or (iii) in the performance of any service, acquired by or for the Government or with funds derived through the Military Assistance Program of the Government or funds otherwise derived through the Government.

(g) **Withholding of Payment.**

(1) Final payment under this contract shall not be made before the Contractor delivers to the Contracting Officer the final report required by (c)(1)(iii), all written invention disclosures required by (c)(1)(i), and all information as to subcontracts required by (d)(2).

(2) If at any time before final payment under this contract the Contractor fails to deliver an interim report required by (c)(1)(ii), or a written invention disclosure required by (c)(1)(i), the Contracting Officer shall withhold from payment $50,000 or five percent (5%), of the amount of this contract whichever is less (or whatever lesser sum is available if payments have exceeded ninety-five percent (95%) of the amount of this contract) until the Contractor corrects all such failures.

(3) After payments total eighty percent (80%) of the amount of this contract, and if no amount is required to be withheld under (2) above, the Contracting Officer may, if he deems such action warranted because of the Contractor's performance under the Patent Rights clause of this contract or other known Government contracts, withhold from payment such sum as he considers appropriate, not exceeding $50,000 or five percent (5%), of the amount of this contract whichever is less, to be held as a reserve until the Contractor delivers all the reports, disclosures, and information spectified in (1) above. Subject to the five percent (5%) or $50,000 limitation, the sum

withheld under this subparagraph (3) may be increased or decreased from time to time at the discretion of the Contracting Officer.

(4) No amount shall be withheld under this paragraph (g) while the amount specified by this paragraph is being withheld under other provisions of this contract. The total amount withheld under (1), (2) and (3) above shall not exceed $50,000 or five percent (5%), of the amount of this contract whichever is less. The withholding of any amount or subsequent payment thereof to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract. This paragraph shall not be construed as requiring the Contractor to withhold any amounts from a Subcontractor to enforce compliance with the patent provision of a subcontract. As used in this paragraph (g), ''this contract'' means ''this contract as from time to time amended.'' In cost-type contracts, ''amount of this contract'' means ''estimated cost of this contract.''

(h) **Contractor's Request for Greater Rights.** The Contractor at the time of disclosing a Subject Invention pursuant to paragraph (c) of this clause, but not later than three (3) months thereafter, may submit in writing to the Contracting Officer, in accordance with applicable regulations, a request for greater rights in such Invention than the license reserved to the Contractor in paragraph (b) of this clause. Each such request shall include, but need not be limited to, information concerning the Contractor's intention and plan to bring the Invention to the point of commercial application. The Contracting Officer shall review the Contractor's request for greater rights and shall notify the Contractor whether, and the extent to which, such request is granted. Any rights granted to the Contractor shall be subject to the provisions of (i) of this clause.

(i) **Reservation of Rights to the Government.**

(1) In the event greater rights in any Subject Invention are vested in or granted to the Contractor pursuant to paragraph (h) above, such greater rights shall, as a minimum, be subject to an irrevocable, nonexclusive and royalty-free license to practice and have practiced each such Subject Invention (made by the Contractor) throughout the world for Governmental purposes, and including the practice of each such Subject Invention (i) in the manufacture, use, and disposition of any article or material, (ii) in the use of any method, or (iii) in the performance of any service, acquired by or for the Government or with funds derived through the Military Assistance Program of the Government or funds otherwise derived through the Government.

(2) In the event greater rights are vested in the Contractor, the Contractor further agrees to and does hereby grant to the Government the right to require the granting of a license to an applicant under any such invention:

(i) on a nonexclusive, royalty-free basis, unless the Contractor, his licensee, or his assignee demonstrates to the Government, at its request, that effective steps have been taken within three (3) years after a patent issues on such Invention to bring the Invention to the point of practical application or that the Invention has been made available for licensing royalty-free or on terms that are reasonable in the circumstances, or can show cause why the title should be retained for a further period of time; or

(ii) royalty-free or on terms that are reasonable in the circumstances to the extent that the Invention is required for public use by Governmental regulations or as may be necessary to fulfill health needs, or for other public purposes stipulated in the Schedule of this contract.

(j) **Right to Disclose Subject Inventions.** The Government may duplicate and disclose reports and disclosures of Subject Inventions required to be furnished by the Contractor pursuant to this Patent Rights clause.

(k) **Forfeiture of Rights in Unreported Subject Inventions.** The Contractor shall forfeit to the Government all rights in any Subject Invention which he fails to report to the Contracting Officer at or prior to the time he (i) files or causes to be filed a United States or foreign application thereon, or (ii) submits the final report required by (c)(iii) of this clause, whichever is later, **provided** that the Contractor shall not forfeit rights in a Subject Invention if (A) contending that the invention is not a Subject Invention, he nevertheless reports the invention and all the facts pertinent to his contention to the Contracting Officer within the time specified in (i) or (ii) above, or (B) he establishes that the failure to report was due entirely to causes beyond his control and without his fault or negligence. The Contractor shall be deemed to hold any such forfeited Subject Invention, and the patent applications and patents pertaining thereto, in trust for the Government pending written assignment of the Invention. The rights accruing to the Government under this paragraph shall be in addition to and shall not supersede any other rights which the Government may have in relation to unreported Subject Inventions. Nothing contained herein shall be construed to require the Contractor to report any invention which is not in fact a Subject Invention.

(l) **Examination of Records Relating to Inventions.** The Contracting Officer, or his authorized representative shall, until the expiration of three (3) years after final payment under this contract, have the right to examine any books, records, documents, and other supporting data of the Contractor which the Contracting Officer or his authorized representative shall reasonably deem directly pertinent to the discovery or identification of Subject Inventions or to compliance by the Contractor with the requirements of this clause.

K-9 RIGHTS IN DATA

(a) **Subject data.** As used in this clause, the term ''Subject Data'' means writings, sound recordings, pictorial reproductions, drawings, designs or other graphic representations, procedural manuals, forms, diagrams, workflow charts, equipment descriptions, data files and data processing or computer programs, and works of any similar nature (whether or not copyrighted or copyrightable) which are specified to be delivered under this contract. The term does not include financial reports, cost analyses, and similar information incidental to contract administration.

RIGHTS IN DATA

K-9

Reference
HEW 315 (Rev. 12/72)

K-9 (b) **Government rights.** Subject only to the proviso of (c) below, the Government may use, duplicate or disclose in any manner and for any purpose whatsoever, and have or permit others to do so, all Subject Data delivered under this contract.

(c) **License to copyrighted data.** In addition to the Government rights as provided in (b) above, with respect to any subject data which may be copyrighted the Contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive and irrevocable license throughout the world to use, duplicate or dispose of such data in any manner and for any purpose whatsoever, and to have to permit others to do so: **Provided, however,** That such license shall be only to the extent that the Contractor now has or prior to completion or final settlement of this contract may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(d) **Relation to patents.** Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(e) **Marking and identification.** The Contractor shall mark all Subject Data with the number of this contract and the name and address of the Contractor or Subcontractor who generated the data. The Contractor shall not affix any restrictive markings upon any Subject Data, and if such markings are affixed the Government shall have the right at any time to modify, remove, obliterate, or ignore any such markings.

(f) **Subcontractor data.** Whenever any subject data is to be obtained from a Subcontractor under this contract, the Contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's rights in that Subcontractor Subject Data.

(g) **Deferred ordering and delivery of data.** The Government shall have the right to order, at any time during the performance of this contract, or within 2 years from either acceptance of all items (other than data) to be delivered under this contract or termination of this contract, whichever is later, any Subject Data and any data not called for in the schedule of this contract but generated in performance of the contract, and the Contractor shall promptly prepare and deliver such data as is ordered. If the principal investigator is no longer associated with the Contractor, the Contractor shall exercise its best efforts to prepare and deliver such data as is ordered. The Government's right to use data delivered pursuant to this paragraph (g) shall be the same as the rights in Subject Data as provided in (b) above. The Contractor shall be relieved of the obligation to furnish data pertaining to an item obtained from a Subcontractor upon the expiration of 2 years from the date he accepts such items. When data, other than Subject Data, is delivered pursuant to this paragraph (g), payment shall be made, by equitable adjustment or otherwise, for converting the data into the prescribed form, reproducing it or preparing it for delivery.

Source of Clause
Regulation

Purpose of Clause

To give the Government the right to use all data produced under the contract in any way it wishes.

Comment

1. **Data** is defined very broadly, and includes
   a. writings, sound recordings, pictorial reproductions
   b. forms and manuals (such as this one)
   c. data files and computer programs
   d. graphs, charts, diagrams and equipment descriptions
   e. works of any similar nature.
2. **Subject data**
   a. **is defined** as all data **specified** to be delivered under the contract, but does **not** include financial reports, cost analyses, or similar information.
   b. **must be marked in a form** so as to
      i. identify by name and address the Contractor or Subcontractor who generated the data
      ii. show the contract number
      iii. not contain any restrictive markings.
3. The Contractor 's duties and rights
   a. The Contractor agrees to let the Government
      i. use, duplicate and **disclose** subject data in **any** manner and for **any** purpose, and allow others to do so
      ii. use, duplicate and **disclose** copyrighted subject data in any manner and for any purpose and allow others to do so
   b. The Contractor **is not required** to grant any right in copyrighted data to the Government if the grant of such a right, in itself, would make the Contractor liable to others for compensation
4. Ordering of data by the Government
   a. The Government may order delivery of
      i. subject data, **AND**
      ii. data generated under but not called for by the contract

   At any time
      i. during performance of the contract, **OR**
      ii. until 2 years after
         a. acceptance of all items to be delivered under the contract
         b. termination of the contract

   Whichever is later

   b. **IF**
   data is generated under but not called for by the contract are ordered,
   THEN,
   Payment must be made (as determined by agreement, equitable adjustment, or otherwise) for the Contractor 's work in converting, reproducing, or preparing the data.

Flow Down

Required. The Government has the right to receive from the Contractor

1. Subject data it obtained from a Subcontractor under the contract
2. Data pertaining to other items obtained from a Subcontractor **until** 2 years from the date the Contractor received such data or items from the Subcontractor.

Special Notes

1. The right of the Government to call up data generated under the contract gives the Government the

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K-10 RIGHTS IN TECHNICAL DATA (1972 APR)

(a) **Definitions.**

(1) **Technical Data,** as used in this clause, means recorded information regardless of form or characteristic, of a scientific or technical nature. it may, for example, be document research, experimental, developmental or engineering work; or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design type documents; in machine forms such as punched cards, magnetic tape, computer memory printouts; or may be retained in computer memory. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. Technical data does not include financial, administrative, cost and pricing, and management data, or other information incidental to contract administration.

(2) **Limited Rights** means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data, be (a) released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture, or (c) used by a party other than the Government, except for:

(i) emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, **provided** that the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or

(ii) release to a foreign government, as the interest of the United States may require only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (i) above.

(3) **Unlimited Rights** means rights to use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) **Government Rights.**

(1) The Government shall have unlimited rights in:

(i) technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense (but see (2) (ii) below);

(iii) technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data;

(iv) technical data pertaining to end-items, components or processes, prepared or required to be delivered under this or any other Government contract or subcontract, for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements (''form, fit and function'' data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.);

(v) manuals or instructional materials prepared or required to be delivered under this contract or any subcontract hereunder for installation, operation, maintenance or training purposes;

(vi) technical data which is in the public domain, or has been or is normally furnished without restriction by the Contractor, or Subcontractor; and

(vii) technical data listed or described in an agreement incorporated into the Schedule of this contract, which the parties have predetermined on the basis of subparagraphs (i) through (vi) above, and agreed will be furnished with unlimited rights.

(2) The Government shall have limited rights in:

(i) technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights; and right to obtain and disclose data which may be confidential **even though** such data was **excluded** from list of data to be delivered under the contract. **K-9**

2. This clause does not give the Government an implied license to any patent the Contractor holds. Nor does it affect the scope of any license or other right granted to the Government under any of the Contractor's patents.

RIGHTS IN TECHNICAL DATA

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Reference

ASPR 7-403.49 incorporates 7-104.9, a. (1972 APR), d. (1974 NOV), h. (1974 NOV), j. (1972 APR), k. (1971 NOV), m. (1974 NOV), and p. (1974 APR)

Source of Clause

Regulation

Purpose of Clause

To define the rights of the Government and the Contractor in technical data, balancing the Government's need for such data with the Contractor's valid economic interests.

Comment

1. **Technical Data**
   - a. Is recorded information of a scientific or technical nature, **regardless** of form
   - b. Includes
     - i. Drawings, photographs, computer cards, print-outs, tapes, or memory
     - ii. Documentations, instructions, specifications, manuals, reports, catalogues, etc.
   - c. **Does not include** financial, cost and pricing, or other administrative data.
2. The Government may have **unlimited or limited** rights in technical data.
   - a. **Unlimited Rights**
     - i. **If** the Government has unlimited rights in technical data **then** it may
       - (a) Use, duplicate, or disclose such data, in whole or in part, for **any** purpose
       - (b) Have or permit others to do so
     - ii. The Government shall have unlimited rights in technical data created under this **or any other** Government contract or subcontract
       - (a) Resulting **directly** from research, developmental, or experimental work **specified** in the contract
       - (b) Pertaining to items, components, or processes developed **under the Government's funding**
       - (c) Which change or correct Government-furnished data
       - (d) Which show the form, fitting, and functional aspects of items to be delivered under the contract
       - (e) Which is necessary for installation, operation, maintenance, or training purposes
       - (f) Which is in the public domain or which is normally furnished by the Contractor or Subcontractor **without** restrictions
       - (g) Which the Contractor has expressly agreed to so furnish
   - b. **Limited Rights**
     - i. **If** the Government has limited rights in technical data **then** it may, without the Contractor's written permission,
       - (a) Use, duplicate or disclose such data, in whole or in part, **within the Government itself** for purposes other than manufacture or normal repair
       - (b) Release such data to a **foreign** government for its **internal use** for purposes other than manufacture or normal repair
       - (c) Use or allow other parties (including foreign governments) to use such data for **emergency**

(ii) technical data pertaining to items, components or processes developed at private expense, other than such data as may be included in the data referred to in (b)(1)(i), (iii), (iv), (v), and (vi);

provided that only the portion or portions of each piece of data to which limited rights are to be asserted pursuant to (2)(i) and (ii) above are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below in which is inserted:

A. the number of the prime contract under which the technical data is to be delivered,

B. the name of the Contractor and any Subcontractor by whom the technical data was generated, and

C. an explanation of the indication used to identify limited rights data.

LIMITED RIGHTS LEGEND

Contract No. ....
Contractor: ....
Explanation of Limited Rights Data Indication Used ....
....
....

Those portions of this technical data indicated as limited rights data shall not, without the written permission of the above Contractor, be either (a) used, released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture or (c) used by a party other than the Government, except for: (i) emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, provided that the release or disclosure hereof outside the Government shall be made subject to a prohibition against further use, release, or disclosure; or (ii) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (i) above. This legend, together with the indications of the portions of this data which are subject to such limitations shall be included on any reproduction hereof which includes any part of the portions subject to such limitations.

(3) No legend shall be marked on, nor shall any limitation on rights of use be asserted as to, any data which the Contractor has previously delivered to the Government without restriction. The limited rights provided for by this paragraph (b)(2) shall not impair the right of the Government to use similar or identical data acquired from other sources.

(c) **Material Covered by Copyright.**

(1) In addition to the rights granted under the provisions of (b) above, the Contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all technical data prepared or required to be delivered under the contract, now or hereafter covered by copyright.

(2) Copyrighted matter shall not be included in technical data furnished hereunder without the written permission of the copyright owner for the Government to use such copyrighted matter in the manner described in (c)(1) above, unless the written approval of the Contracting Officer is obtained.

(3) The Contractor shall report to the Government (or higher-tier Contractor) promptly and in reasonable written detail each notice or claim of copyright infringement received by the Contractor with respect to any technical data delivered hereunder

(d) **Removal of Unauthorized Markings.** Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct or cancel any marking not authorized by the terms of this contract on any technical data furnished hereunder, if—

(i) the Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings, or

(ii) the Contractor's response fails to substantiate within 60 days after written notice the propriety of the markings by clear and convincing evidence.

In either case the Government shall give written notice to the Contractor of the action taken.

(e) **Relation to Patents.** Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(f) **Limitation on Charges for Data.** The Contractor recognizes that the Government, or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data on account of such a contract. The Contractor further recognizes that is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data which the Government has a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data. In

repair or overhaul work **WHEN**
- (i) There is no reasonably available alternative item **AND**
- (ii) Any further use, release, or disclosure of the data is prohibited.

In all other circumstances, and for all other uses, **the Government must get the Contractor's prior written permission.**

- ii. The Government shall have limited rights **only** in technical data
  - (a) Covered by a specific agreement incorporated into the contract
  - (b) Pertaining to end items, components, or processes developed at **private expense.**

3. Requirements for securing and maintaining limited rights
   - a. In order to limit the Government's rights in technical data, the Contractor must
     - i. **Identify** limited rights technical data as such the **first** time that such data is submitted to the Government and thereafter
     - ii. **Mark** such data with the restrictive, limited rights legend, (a model appears in the clause) including
       - (a) The contract number
       - (b) The name of the Contractor or Subcontractor, and
       - (c) An explanation of the markings
   - b. In order to maintain the limited rights restrictions, the Contractor must
     - i. Within sixty days of the award of the contract, give the Contracting Officer **written** identification of the **person** in its organization who
       - (a) Will have **final responsibility** for deciding whether or not restrictive markings are to be placed on technical data delivered under the contract **AND**
       - (b) **Is authorized** to be the **direct** contact with the Government in resolving questions concerning such markings
     - ii. **Initiate, maintain, and follow written** procedures designed to assure that any of its restrictive markings are used **only when authorized.** These include maintaining records to show
       - (a) The application and use of its procedures
       - (b) The legitimacy of its claimed authorizations
     - iii. Maintain a quality assurance system to assure compliance with the clause
   - c. **Review of the Contractor's Limited Rights Procedures**

     The Contractor must submit a copy of its written procedures to the Contracting Officer **upon request. If** the Contracting Officer finds that
     - i. The Contractor has failed to maintain or follow its established limited rights procedure **OR**
     - ii. There is a material deficiency in such procedures

     Then the Contracting Officer may
     - i. Give **written** notice of such failure to the Contractor, **AND**
     - ii. **Specify** a period of not less than thirty days within which the Contractor must make the necessary corrections
   - d. **Government Response To Invalid Procedures or Markings**
     - i. The Government, upon giving the Contractor **written** notice of any action taken, may
       - (a) **Cancel** and **ignore** limited rights markings when
         - (i) The Contractor fails to make a good faith effort to **initiate** the required limited rights procedures
         - (ii) The Contractor's procedures are deficient or not followed **and** the Contractor failed to correct them within the **specified** time
       - (b) **Correct** or **cancel** any unauthorized markings **IF**
         - (i) The Contractor does not respond within sixty days to the Government's written inquiry concerning the propriety of such markings
         - (ii) The Contractor's response does not substantiate clearly and convincingly the propriety of the markings.
     - ii. Withholding of Payment

       If technical data under this contract is delivered with unauthorized restrictive markings, **then** the Government may withhold payment of 10% or a specified lesser amount of the contract cost **until** the Government accepts the data.

recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts, or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(g) **Acquisition of Data from Subcontractors.**

(1) Whenever any technical data is to be obtained from a Subcontractor under this contract, the Contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government or the Contractor's rights in that Subcontractor data which is required for the Government.

(2) Technical data required to be delivered by a Subcontractor shall normally be delivered to the next higher-tier Contractor. However, when there is a requirement in the prime contract, for data which may be supplied with limited rights pursuant to (b)(2) above, a Subcontractor may fulfill such requirement by submitting such data directly to the Government rather than through the prime Contractor.

(3) Contracting Officer approval is not necessary under this clause for the Contractor to use the item, leverage to acquire rights in technical data from their Subcontractors for themselves.

Notice of Certain Limited Rights. The paragraph (h) set forth below may be added to the clause above in any contract in which the Contracting Officer desires notification of limited rights data.

(h) (1) Unless the Schedule provides otherwise, and subject to (2) below, the Contractor will promptly notify the Contracting Officer in writing of the intended use by the Contractor or a Subcontractor in performance of this contract of any item, component or process for which technical data would fall within paragraph (b)(2) above.

(2) Such notification is not required with respect to:

(i) standard commercial items which are manufactured by more than one source of supply; or

(ii) items, components or processes for which such notice was given pursuant to predetermination of rights in technical data in connection with this contract.

(3) Contracting Officer approval is not necessary under this clause for the Contractor to use the item, component or process in the performance of the contract. (1972 APR)

DEFERRED DELIVERY OF TECHNICAL DATA (1972 APR)

The Government shall have the right to require, at any time during the performance of this contract, within two (2) years after either acceptance of all items (other than data) to be delivered under this contract or termination of this contract, whichever is later, the delivery of any technical data item identified in this contract as ''deferred delivery'' data. The obligation to furnish such technical data required to be prepared by a Subcontractor and pertaining to an item obtained from him shall expire two (2) years after the date Contractor accepts the last delivery of that item from that Subcontractor for use in performing this contract.

TECHNICAL DATA — WITHHOLDING OF PAYMENT (1974 APR)

(a) If ''Technical Data'' (as defined in the clause of this contract entitled ''Rights in Technical Data''), or any part thereof, specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not specifically authorized by this contract), the Contracting Officer may until such data is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the contract. Payments shall not be withheld nor any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) After payments total ninety percent (90%) of the total contract price or amount and if all technical data specified to be delivered under this contract has not been accepted, the Contracting Officer may, withhold from further payment such sum as he considers appropriate, not exceeding ten percent (10%) of the total contract price or amount unless a lesser withholding limit is specified in the contract.

(c) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract.

CONTRACT SCHEDULE ITEMS REQUIRING EXPERIMENTAL, DEVELOPMENTAL OR RESEARCH WORK (1972 APR)

For purposes of defining the nature of the work and the scope of rights in data granted to the Government pursuant to the ''Rights in Technical Data'' clause of this contract, it is understood and agreed that items **(list applicable schedule line items or sub-line items, or data exhibit numbers)** require the performance of experimental, developmental, or research work. This clause does not constitute a determination as to whether or not any data required to be delivered under this contract falls within the definition of limited rights data.

iii. The Government may also pursue any other remedies available to it under the contract (see e.g. the ''Terminations'' clause).

4. **Copyrighted Data**

a. The Contractor **grants** the Government a royalty-free, nonexclusive, and irrevocable **license** throughout the world to use or allow others to use for Government purposes any copyrighted material prepared or required to be delivered under the contract.

b. The Contractor Agrees

i. Not to charge other Contractors copyright royalties for the use of technical data in which the Government has **unlimited** rights **if** such other Contractors are performing for

(a) The United States Government

(b) A foreign government, funded by the United States

ii. To refund any such charges

c. The Contractor shall **not** include material copyrighted by others in technical data delivered under the contract **UNLESS**

i. The copyright owner gives **written** permission **OR**

ii. The Contracting Officer gives **written** approval

d. The Contractor shall report to the Government any claim of copyright infringement in connection with technical data furnished under the contract

5. **Delivery of Technical Data to the Government**

a. Because the preparation, maintenance, and updating of technical data is expensive, the Government may want to

i. **Delay ordering** technical data from the Contractor until a time when the needed data can be specifically identified, or

ii. **Defer delivery** of necessary technical data until the **time** when needed, or

iii. **Assure timely and acceptable delivery** of technical data when needed.

b. **Delayed ordering of technical data**

i. **If applicable,** the Contracting Officer will insert a clause in the contract under which the Government may order any technical data generated under the contract or any of its subcontracts

(a) At any time during performance of the contract, **OR**

(b) Within **three** years of

(i) Acceptance of **all** items (except technical data) to be delivered under the contract or its subcontracts, **OR**

(ii) Termination of the contract

ii. The Contractor will be compensated for

(a) Converting the data into the prescribed form

(b) Reproduction and delivery of the data.

c. **Deferred Delivery of Technical Data**

If applicable, the Contracting Officer will insert a clause in the contract under which the Government may order delivery of any specified technical ''deferred delivery.'' Data generated under the contract or its subcontracts

i. At any time during performance of the contract, or

ii. Within **two** years of

(a) Acceptance of **all** items (other than data) to be delivered under the contract or its subcontracts, or

(b) Termination of the contract.

d. **Methods of Assuring Delivery**

i. Withholding payment

(a) **When** — The Contracting Officer may withhold payment **IF**

(i) Technical data specified to be delivered under the contract

(aa) Are not delivered within the specified time, **OR**

(bb) Are deficient upon delivery **unless** the Contractor's failure occurred

(i) Because of causes beyond its control, and

(ii) Without its fault or negligence

K-10 RIGHTS IN TECHNICAL DATA — MAJOR SYSTEM AND SUBSYSTEM CONTRACTS (1971 NOV)

The Contractor agrees that he will neither incorporate any provision in his subcontracts nor enter into any agreement, written or oral, either directly or indirectly, with Subcontractors which has or may have the effect of prohibiting Subcontractor sales directly to the Government of any supplies, like those manufactured or services like those furnished by such Subcontractor under this contract or any follow-on production contract, or under any contract for parts or components of supplies furnished under this or any follow-on production contract. The Contractor further agrees that all data, including data in which the Government may not have unlimited rights, furnished or otherwise made available by the Contractor for use by Subcontractors in furnishing such supplies or services, will be furnished to such Subcontractors without payment to the Contractor of any fee, royalty or other charge by the Subcontractor or the Government for use by such Subcontractors in furnishing such supplies or services for sale directly to the Government. For the purpose of this paragraph, the term ''fee, royalty or other charge'' shall not include within its meaning fees, royalties or charges for reasonable returns on use of patents.

DEFERRED ORDERING OF TECHNICAL DATA (1972 APR)

In addition to technical data specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of three (3) years after acceptance of all items (other than technical data) to be delivered under this contract or the termination of this contract, order any technical data (as defined in the ''Rights in Technical Data'' clause of this contract) generated in the performance of this contract or any subcontract hereunder. When such technical data is ordered, the Contractor shall be compensated for converting the data into the prescribed form, for reproduction and delivery. The obligation to deliver such technical data of a Subcontractor and pertaining to an item obtained from him shall expire three (3) years after the date the Contractor accepts the last delivery of that item from that Subcontractor under this contract. The Government's rights to use said data shall be pursuant to the ''Rights in Technical Data'' clause of this contract.

RESTRICTIVE MARKINGS ON TECHNICAL DATA (1974 APR)

(a) The Contractor shall have, maintain, and follow throughout the performance of this contract, procedures sufficient to assure that restrictive markings are used on technical data required to be delivered hereunder only when authorized by the terms of the ''Rights in Technical Data'' clause of this contract. Such procedures shall be in writing. The Contractor shall also maintain a quality assurance system to assure compliance with this clause.

(b) As part of the procedures, the Contractor shall maintain (1) records to show how the procedures of (a) above were applied in determining that the markings are authorized, as well as (2) such records as are reasonably necessary to show pursuant to (d)(ii) of the ''Rights in Technical Data'' clause that restrictive markings used in any piece of technical data delivered under this contract are authorized.

(c) The Contractor shall, within sixty (60) days after award of this contract, identify in writing to the Contracting Officer by name or title the person(s) having the final responsibility within Contractor's organization for determining whether restrictive markings are to be placed on technical data to be delivered under this contract. The Contractor hereby authorizes direct contact between the Government and such person(s) in resolving questions involving restrictive markings.

(d) The Contracting Officer may evaluate or verify the Contractor's procedures to determine their effectiveness. Upon request, a copy of such written procedures shall be furnished. The failure of the Contracting Officer to evaluate or verify such procedures shall not relieve the Contractor of the responsibility for complying with (a) and (b) above.

(e) (1) If the Contractor fails to make a good faith effort to institute the procedures of (a) and (b) above, any limited rights markings on technical data delivered under this contract may be canceled or ignored by the Contracting Officer. The Contracting Officer shall give written notice to the Contractor of the action taken, including identification of the data on which markings have been canceled or ignored, and thereafter may use such data with unlimited rights.

(2) The Contracting Officer may give written notification to the Contractor of any failure to maintain or follow the established procedures, or of any material deficiency in the procedures, and state a period of time not less than thirty (30) days within which the Contractor shall complete corrective action. If corrective action is not completed within the specified time, restrictive markings on any technical data being prepared for delivery or delivered under this contract during that period shall be presumed to be unauthorized by the terms thereof and the Contracting Officer may cancel or ignore such markings if the Contractor is unable to substantiate the markings in accordance with the procedures of paragraph (d) of the ''Rights in Technical Data'' clause.

(f) Notwithstanding any provisions of this contract concerning inspection and acceptance, the acceptance by the Government of technical data with restrictive legends shall not be construed as a waiver of any rights accruing to the Government.

(g) This clause, including this paragraph (g) shall be included in each subcontract under which technical data is required to be delivered. When so inserted, ''Contractor'' shall be changed to ''Subcontractor.''

(ii) All technical data specified to be delivered under the contract have not been accepted, **and** 90% of the contract cost has been paid.

(b) **Amount** — The Contracting Officer may withhold up to 10% of the contract cost **unless** a lesser amount is specified in the contract.

ii. Other Methods

The Government may also pursue any other remedies available to it under the contract (see e.g. the ''Terminations'' clause).

Flow Down

Required without change when technical data is acquired from any tier Subcontractor.

Special Notes

1. These clauses do **not** affect any patent rights of the Contractor or the Government.
2. This clause is **not used** in contracts which
   a. Require **all** technical data to be acquired with unlimited rights
   b. Acquire existing works such as books off the shelf or motion pictures
   c. Require the production of motion pictures, histories, etc.
   d. Are to be performed outside the United States, its Territories, or Puerto Rico.

Such contracts have their own specific rights in technical data clauses

3. The Subcontractor normally gives its technical data to the next-higher level Contractor, but ''limited rights'' technical data, with the required legend, **may** be given **directly** to the Government.
4. Contractors may **not** use their economic power to acquire rights in their technical data from Subcontractors for themselves.
5. **If** the Contracting Officer desires notification of use by the Contractor of any item, component or process
   a. For which there are limited rights technical data and
   b. For purposes other than the performance of the contract **then** a clause to that effect will be included in the contract. However, that clause will not apply to the use of standard commercial items or items about which notice was already given.
6. The Government, when necessary, may insert a clause requiring the Contractor to warranty that technical data delivered under the contract conforms to all specifications and requirements. Such a warranty will extend for at least three years after complete delivery of the data. The Government's remedies for breach of this warranty will vary according to the specific clause used but will normally include the power to obtain replacements or corrections, and the power to adjust the contract price.

SECTION L
DISPUTES

L-1 DISPUTES (1958 JAN)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This ''Disputes'' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: **provided,** that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

DISPUTES

References

ASPR 7-402.11 incorporates 7-103.23 (1958 JAN)
FPR 1-7.202-12 incorporates 1-7.102.12
HEW 315 (Rev. 12/72)

Source of Clause

Regulation and 41 U.S.C. §§321, 322 [Wunderlich Act]

Purpose of Clause

To specify a procedure for administrative resolution of disputes between the Government agency and the Contractor when the two parties cannot reach an agreement.

Comment

1. **Basic Resolution of Disputes**

When the Contractor and Contracting Officer cannot reach agreement concerning an issue arising under the contract, the Contracting Officer makes a decision in the matter. This decision must be

a. Put in writing and

b. Delivered to the Contractor.

2. **The Contractor's Appeal**

If the Contractor disagrees with the decision, then he must appeal **within 30 days of receiving it** or the decision **on the facts** of the case is final. To appeal the Contractor must:

a. Clearly state his intent to appeal in writing

b. Address it to the Secretary of the agency involved

c. Deliver it to the Contracting Officer

3. **Duty to Continue Work**

Until a final decision is reached on appeal, the Contractor **must continue working** on the contract in accordance with the Contracting Officer's decision.

4. **Basic Appeal Board**

The appeal is usually considered by an agency contracts appeal board and the Contractor is given the opportunity to

a. Present his case

b. Present written and testimonial evidence

c. Be represented by counsel.

5. **Decisions**

The Contract Appeals Board will make decisions involving

a. **The facts of the case.** Such decisions are final unless found on review by higher authority to be:

i Fraudulent
ii Capricious
iii Arbitrary
iv So grossly erroneous as necessarily to require bad faith, or
v Not supported by substantial evidence.

b. **The questions of law** involved in the case. Such decisions are not final and are reviewable for error.

6. **Further Appeal**

Following decision by the Contract Appeals Board the Contractor may appeal in the alternative or successively to

a. The General Accounting Office

b. The Court of Claims or at the Contractor's option for claims involving less than $10,000, to the proper Federal District Court.

L-1

L-2 PAYMENT OF INTEREST ON CONTRACTOR'S CLAIMS (1972 MAY)

(a) If an appeal is filed by the Contractor from a final decision of the Contracting Officer under the DISPUTES clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the Contractor. Such interest shall be at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41; 85 STAT 97 for the Renegotiation Board from the date the Contractor furnishes to the Contracting Officer his written appeal pursuant to the DISPUTES clause of this contract, to the date of (i) a final judgment by a court of competent jurisdiction, or (ii) mailing to the Contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a Board of Contract Appeals.

(b) Notwithstanding (a) above, (i) interest shall be applied only from the date payment was due, if such date is later than the filing of appeal; and (ii) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly delayed in pursuing his remedies before a Board of Contract Appeals or a court of competent jurisdiction.

(End of clause)

Flow Down L-1

Not required. ASPR 23-203 prohibits a Contracting Officer from consenting to a subcontract clause purporting to give a Subcontractor **direct** access to the disputes procedures **although** the Prime Contractor may bind himself to prosecute the Subcontractor's claim through assertion of the Prime Contractor's right to appeal.

Special Notes

1. **Question of Fact Arising Under the Contract**

The issue in dispute must concern a fact question which is covered or created by a provision of the contract — it must involve a determination for which provision is made in the contract. For example, equitable adjustments under the ''Changes'' clause are subject to the ''Disputes'' clause. If there were no contract term providing for such equitable adjustments, the Contractor could not use the ''Disputes'' procedure and would have to sue the Agency for Breach of Contract.

Where the contract may be construed to provide an ''internal'' remedy, appeal to the Board may be worthwhile since the Board may accept the appeal or will deny it within adequate time to institute a court suit.

2. **Contracting Officer's Decision — "Final Decision"**

Agency regulations usually require that the decision meet formal criteria in order to simplify the determination of whether it is a final decision and therefore properly appealable. This is done to discourage the taking of appeals when agreements are still possible.

Normally the Contracting Officer's final decision or notice of final decision must indicate it is a final decision, advise the Contractor of his right to appeal, provide the information necessary to file an appeal and give the findings of fact supporting the decision. Failure to comply with these criteria may not bar an appeal and where there is doubt as to the character of the decision an appeal may be taken or, if sufficient time exists, a request for a final decision can be made.

The Contracting Officer cannot prevent a Contractor from resorting to the ''Disputes'' clause. Refusal to reach or unreasonable delay in reaching a final decision are adequate grounds for appeal to the board.

3. **30 Day Period for Appeal**

The 30 day limit is strictly enforced. Failure to file within the period eliminates any possibility for review of the Contracting Officer's decision with the exception of very unusual circumstances. The postmark of the envelope carring the appeal will control in determining the date of filing.

4. **Contracting Officer's Reconsideration, Revocation of Decision or Withdrawal of Findings of Fact**

After an appeal is filed the positions of the parties are not fixed. The Contracting Officer may stop the procedure by revoking his decision and/or findings and then reconsidering his decision. Since there is a new opportunity for agreement and strictly speaking no ''Dispute'' the appeal will then be dismissed.

5. **Duty to Continue Performing Until Final Decision**

The language of the clause is somewhat ambiguous and may be read to require performance in accord with the Contracting Officer's decision only until a decision by the Board or until the matter is resolved by a court upon further appeal. Because the clause established an administrative system, the statement ''pending final resolution of a dispute hereunder . . . '' may be taken to mean decision by the Board however, if this issue does arise, getting specific advice of counsel is suggested.

PAYMENT OF INTEREST ON CONTRACTOR'S CLAIMS L-2

References

ASPR 7-403.48, incorporates 7-104.82 (1972 MAY)
FPR 1-7.202.34 incorporates 1-1.322
HEW-315 (Rev. 12/72)

Source Of Clause

Regulation

Purpose Of Clause

To provide for payment of interest to the Contractor on the amount of a claim determined, in proceedings under the ''Disputes'' clause, to be owed by the Government.

Comment

1. Payment of Interest.

   IF

   under the ''Disputes'' clause,

   a. The Contracting Officer denies a claim arising under the contract, **and**

   b. The Contractor files a timely appeal, **and**

   c. The claim is finally resolved, either in judicial or administrative proceedings, in the Contractor's favor,

   THEN

   the Contractor shall be paid **simple interest** on the amount determined to be owed by the Government.

2. The **time period** for which interest shall be paid **begins on**,

   a. The date the Contractor furnishes his written appeal to the Contracting Officer, **or**

   b. The date the claimed payment is due, whichever is later, and **ends on**

      i. the date of a final judgment by a court of competent jurisdiction, **or**

      ii. the date of a mailing to the Contractor of a supplemental agreement which either

         (a) confirms completed negotiations between the parties, or

         (b) carries out a decree of the Board of Contract appeals.

3. The **rate of interest** shall be determined by the Secretary of the Treasury, taking into consideration current private commercial rates for new loans maturing in five years as required by Public Law 92-41, 85 stat. §97, 50 App. U.S.C. §1215 (b)(2). Such rates are announced in the Federal Register on or about January 1 and July 1 of each year by the Renegotiation Board.

4. **Simple interest shall accrue and be paid** at the rate specified by the Secretary of the Treasury to be applicable for each six-months period beginning on January 1 and July 1. The rate of interest to be paid on the determined amount may change every six months, but the determined amount against which the interest rate(s) is applied shall not include any accrued interest.

Flow Down

Not required

Special Notes

1. This clause does not apply to claims arising under contracts for purchases of supplies or personal services that do not exceed $2,500. See ASPR 3-600, FPR 1-3.600.

2. If the Contractor takes his claim to the Court of Claims and receives a favorable judgment, interest on the amount determined to be due the Contractor shall not be allowed **unless** such payment is **expressly provided for in the contract.** (28 U.S.C. §2516(a) (1970). This rule is also applicable to the United States District Courts by judicial decision.

3. Interest shall not be paid for any amount of time the Contracting Officer determines to constitute an undue delay by the Contractor in advancing its claim.

4. No interest shall be paid on the amount due under a settlement agreement or a settlement by determination. However, interest may be allowed on a successful appeal by the Contractor if the contract contains the ''Payment of Interest on Contractor's Claims'' clause. See ASPR 8-213-2(c), FPR 1-8.212-2(c).

SECTION M
TERMINATION

M-1 TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT (1973 APR)

(a) The performance of work under this contract may be terminated, in whole or from time to time in part, by the Government whenever for any reason the Contracting Officer shall determine that such termination is in the best interest of the Government. Termination of work hereunder shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated and the date upon which such termination becomes effective.

(b) After receipt of the Notice of Termination the Contractor shall cancel his outstanding commitments hereunder covering the procurement of materials, supplies, equipment and miscellaneous items. In addition the Contractor shall exercise all reasonable diligence to accomplish the cancellation or diversion of his outstanding commitments covering personal services and extending beyond the date of such termination to the extent that they relate to the performance of any work terminated by the notice. With respect to such cancelled commitments the Contractor agrees to (i) settle all outstanding liabilities and all claims arising out of such cancellation of commitments, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all purposes of this clause, and (ii) assign to the Government, in the manner, at the time, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts.

(c) The Contractor shall submit his termination claim to the Contracting Officer promptly after receipt of a Notice of Termination, but in no event later than one year from the effective date thereof, unless one or more extensions in writing are granted by the Contracting Officer upon written request of the Contractor within such one year period or authorized extension thereof. Upon failure of the Contractor to submit his termination claim within the time allowed, the Contracting Officer may determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Any determination of costs under paragraph (c) shall be governed by the cost principles set forth in Section XV, Part 3, of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(e) Subject to the provisions of paragraph (c) above, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the termination under this clause, which amount or amounts may include any reasonable cancellation charges thereby incurred by the Contractor and any reasonable loss upon outstanding commitments for personal services which he is unable to cancel; **provided,** however, that in connection with any outstanding commitments for personal services which the Contractor in unable to cancel, the Contractor shall have exercised reasonable diligence to divert such commitments to his other activities and operations. Any such agreement shall be embodied in an amendment to this contract and the Contractor shall be paid the agreed amount.

(f) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments against costs incurred by the Contractor in connection with the terminated portion of this contract, whenever, in the opinion of the Contracting Officer, the aggregate of such payments is within the amount to which the Contractor will be entitled hereunder.

(g) The Contractor agrees to transfer title and deliver to the Government, in the manner, at the time, and to the extent, if any, directed by the Contracting Officer, such information and items which, if the contract had been completed, would have been required to be furnished to the Government, including:

(i) completed or partially completed plans, drawings and information; and

(ii) materials or equipment produced or in process or acquired in connection with the performance of the work terminated by the notice.

Other than the above, any termination inventory resulting from the termination of the contract may, with the written approval of the Contracting Officer, be sold or acquired by the Contractor under the conditions prescribed by and at a price or prices approved by the Contracting Officer. The proceeds of any such disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of work covered by this contract or paid in such other manner as the Contracting Officer may direct. Pending final disposition of property arising from the termination, the Contractor agrees to take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

(h) Any disputes as to questions of fact may arise hereunder shall be subject to the ‘‘Disputes’’ clause of this contract.

TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT

References

ASPR 7-402.10 incorporates 7-302.10(b) (1973 APR) in accordance with 8-702 and 8-704
FPR 1-8.704-1 in accordance with 1-8.700-2(a)4
HEW-315 (Rev. 12/72)
NASA PR 7-451.10 incorporates 8-704.1 (1972 JUN)

Source of Clause

Regulation

Purpose of Clause

To provide the Government with the unilateral right to terminate a contract at any time and for any reasons that it considers to be in its best interest. To establish a procedure for contract termination and to provide a method to settle the Contractor's claim for compensation arising from such termination.

Comments

1. The Government's Right to Terminate

   If the Contracting Officer determines for any reason that termination of work under the contract is in the best interests of the Government he may terminate the contract:

   a. Either **in whole**

   b. Or **in part.**

2. **Termination Procedures** — To terminate a contract, the Contracting Officer must send a **written** ''Termination Notice.''

   a. The ''Termination Notice''
      i. Must state that the contract is being terminated
      ii. Must state the effective date of termination
      iii. Must state the extent of the termination
      iv. Must recommend actions by which the Contractor may minimize the impact of termination
      v. May include any special instructions
      vi. Does **NOT** have to state the ''reason'' for termination.

   b. Copies of the Termination Notice must be sent to
      i. The Contractor
      ii. Any known assignee, guarantor, or surety of the Contractor.

3. Duties of the Contractor after it receives the Termination Notice

   After receipt of the Notice of Termination, the Contractor must:

   a. **Cancel all commitments, subcontracts and purchase orders** relating to the terminated work.

   b. **Settle** all claims and liabilities arising from the cancellation of commitments, **subject to** final approval or ratification by the Contracting Officer.

   c. **Assign** to the Government all rights, titles, and interests of the Contractor arising from the terminated work, **as directed by** the Contracting Officer.

   d. **Be responsible for all property** arising from the termination.

   e. **Settle its termination claims** against the Government with the Contracting Officer.

4. Contractor's Responsibility for Property Arising From the Termination

   Generally, the Contractor agrees to protect and preserve, as directed by the Contracting Officer, all property related to the contract.

   a. Property to have been furnished to the Government had the contract been completed:

      The Contractor agrees to transfer title and deliver to the Government, as directed by the Contracting Officer, all property of this type, including:

      i. **Wholly or partially completed plans, drawings, etc.**
      ii. **Complete or incomplete materials and equipment.**

b. Physical property purchased, supplied, manufactured, furnished, or otherwise acquired for the terminated part of the contract (Termination Inventory).

The Contractor must as prescribed and approved by the Contracting Officer:

i. Submit a schedule of such Inventory.
ii. Dispose of such Inventory by
  (a) Purchase or retention at cost. **OR**
  (b) Returning it to the suppliers, **OR**
  (c) Selling it.

Any disposition proceeds will be applied against payments to be made to the Contractor by the Government.

5. Settlement of the Contractor's Termination Claims

a. Settlement of a Contractor's claims against the Government arising from termination may be made by:
  i. A negotiated settlement
  ii. A determination by the Contracting Officer.

b. A Negotiated Settlement
  i. The Contractor must submit his termination claim promptly (but no later than **one** year after the effective date of termination) to the Contracting Officer (who may extend the required time after receiving a **written** request).
  ii. the parties shall negotiate the amount due, including
    (a) Reasonable cancellation charges incurred by the Contractor.
    (b) Any reasonable loss due to uncancellable commitments for personal services, provided that the Contractor tried to limit them.
  iii. The Contractor's claim will be audited if it is **for more than** $10,000 under ASPR or $2,500 under FPR (or a lesser amount, if deemed necessary by the Contracting Officer).

c. Determination by the Contracting Officer

  IF
  i. The Parties cannot agree on a settlement, or
  ii. No claim is submitted within the year's period

  THEN the Contracting Officer
  i. Must send a certified mail notice giving the Contractor at least 15 days to send written substantiation of his claim (when a claim has been made).
  ii. Determine, after reviewing the information submitted or otherwise available to him, the amount due,

  BUT
  i. The Contractor has a right of **appeal**, under the ''Disputes'' clause, regarding disputed facts,
  ii. Unless he failed to submit his claim within the one year period.

d. Settlement Conditions
  i. All settlements are governed by the Cost Principles set forth in ASPR, Section 15, Part 3.
  ii. Settlements for more than $50,000 **must** be submitted to the Settlements Review Board for Approval (others **may** be so submitted if the Contracting Officer desires).
  iii. Partial Payments may be made to the Contractor prior to settlement, when and to the extent approved by the Contracting Officer.
  iv. The approved settlement agreement shall become an amendment to the contract.
  v. The Contractor shall be paid the agreed amount.

Flow Down

1. Not required. However, this clause modified to reflect the relationship between the Contractor and Subcontractor, is suggested for inclusion in subcontracts with educational institutions **IF**

  a. they are negotiated on the basis of, or adopt the applicable cost principles.

  b. Such subcontracts are placed on a no-fee or no-profit basis.

2. If the modified clause is not included in the subcontract, the Contractor will find itself obligated to continue the subcontract even though its prime contract has been terminated.

3. When the Contracting Officer determines it is in the best interest of the Government, he may, **with agency approval,** make a **direct** settlement with the Subcontractor for claims arising because of the termination. The Subcontractor who makes such a direct settlement with the Government may have a right of appeal under the disputes clause.

Special Notes

1. If by intentional or inadvertent omission, the ''Termination'' clause is not negotiated into the contract, it will still be read into the contract by operation of law.

2. Besides the settlement of Subcontractor claims, the Government has the right to settle or pay **all other** claims arising from the Contractor's cancellation of its commitments or orders when such is caused by the Government's termination of the contract.

3. If partial payments made during the termination process exceed the final settlement amount, the excess will be payable by the Contractor to the Government upon demand. If the excess is not paid when demanded, interest shall be payable:

   a. At the rate of **6%** beginning 30 days from the date of the demand (under FPR and HEW) **OR**

   b. At a rate **established** by the Secretary of the Treasury (pursuant to Public Law 92-41) effective from the date the Contractor received the excess payment to the date of repayment (under ASPR)

   BUT

   No interest will be charged for overpayments in cost reimbursement research and development contracts (no fee and no profit) if they are repaid within 30 days after the Government demand.

4. The Settlement Review Board's function is to determine the overall **reasonableness** of the proposed settlement agreement, so as to insure that it:

   a. Has been conducted competently, and

   b. Is based on adequate information.

5. Action by the Government under this clause does not render ineffective any other clause included or required to be included in the contract. For example, a Contractor who exceeds the costs allowable under the ''Limitation of Cost'' clause may not be entitled to reimbursement even if such costs were incurred pursuant to a termination action.

PART III

SUPPLEMENTARY REFERENCE MATERIAL

The supplementary reference materials in this part are presented in six sections. Sections A and B are background material primarily of interest to those who have recently entered the field of research administration.

Sections C, D, E, and F are specimen contract forms and clauses which are included for use by the research administrator. These materials will be of benefit when an educational institution finds itself contracting for research and development with non-government parties. On one hand the institution may be subcontracting part of its work under a Government contract to another organization. On the other, it may be contracting to do work for an industrial firm or another educational institution.

These specimen formats and clauses are included for two purposes:

(1) To provide the research administrator alternate contract formats and a pool of contract clauses from which he can develop a contract for work to be done by another organization.

(2) To provide clauses which can be used for negotiation when the educational institution is presented with a contract containing unacceptable clauses.

The contract formats and specimen clauses may require modifications to conform to the policies, procedures, and specific circumstances of the educational institution.

SECTION A

COST PRINCIPLES FOR EDUCATIONAL INSTITUTIONS

This Section (III A) was drafted by Raymond J. Woodrow, Assistant for Special Studies, University Research Board, Princeton University. OMB circular A-21 is now published by the General Services Administration as Federal Management Circular 73-8: Cost Principles for Educational Institutions.

Office of Management and Budget Circular A-21

History

Before World War II, there was little need for, and practically no attention devoted to accounting procedures to separate and identify direct costs and indirect costs in colleges and universities. During the war, when many universities undertook vital research and development for the Federal Government, some rough approximations were developed to reimburse universities for the indirect as well as the direct costs of war related R & D.

When it became evident after the war that Government sponsored research would continue on a significant scale at colleges and universities, the first formal document setting forth principles for the determination of applicable costs was negotiated between Government and university representatives. Then Secretary of the Navy Forrestal was a prime mover. The result was entitled ''Explanation of Principles for Determination of Costs under Government Research and Development Contracts with Educational Institutions,'' War Department-Navy Department, August 1947, often known as the ''Blue Book'' to distinguish it from the ''Green Book,'' which applied to commercial organizations.

These principles were relatively simple as were the calculations of indirects costs based on them.

By 1957, when the volume of Government sponsored research in colleges and universities had grown substantially, some Government agencies felt that greater refinements were necessary than were provided for by the ''Blue Book.'' An interagency committee headed by the then Bureau of the Budget prepared the first draft of a new set of principles which were then referred for comment to a working group of seven university representatives operating under the aegis of the American Council on Education. A number of redrafts were prepared by both the Government and the university representatives and there were also a number of meetings in the sixteen month period before final issuances in September 1958 of Bureau of the Budget Circular No. A-21, ''Principles for Costing Research and Development Under Grants and Contracts With Educational Institutions.''

These new cost principles raised many questions and some opposition on the part of some institutions, to the extent that a pilot study group was drawn together to examine the effects of implementation. The results of the pilot study were that A-21 as originally issued created enough problems so that recommendations were submitted to the Bureau of the Budget for changes. Some, but not many, of these recommendations were accepted in a revised version issued in January of 1961.

As time progressed, further changes were made, in March 1965, September 1970, March 1971 and July 1972. Mostly these changes were favorable to the institutions as the Government became more aware of and perhaps more sensitive to institutional environments and operations. The 1970 version and subsequent versions of A-21 were issued by the Office of Management and Budget with the revised title ''Principles for Determining Costs Applicable to Research and Development and Educational Services Under Grants and Contracts With Educational Institutions;'' provisions for educational, i.e. teaching agreements, were included for the first time. However, colleges and universities as of this writing believe that still further changes would be desirable and have submitted recommendations which are under consideration by the General Services Administration, which has taken over responsibility for A-21 from the Office of Management and Budget.

Characteristics

Paraphrasing from the stated objectives of Circular No. A-21, it provides principles for determining the costs applicable to research, development and educational services performed by educational institutions under grants from and contracts with the Federal Government. The principles are confined to the subject of cost determination and no attempt is made to identify the circumstances or dictate the extent of agency and institutional participation in the financing of a particular project. The principles are designed to provide recognition of the full allowable costs of a project under generally accepted accounting principles. No provision for profit or other increment above cost is intended.

The Circular contains the following definition of direct costs:

> ''Direct costs are those costs which can be identified specifically with a particular research project, an instructional activity or any other institutional activity or which can be directly assigned to such activities relatively easily with a high degree of accuracy.''

Normally direct costs must be separated into at least three distinct cost centers: organized research, which means separately budgeted research sponsored by the Federal Government and other outside sources plus research paid for from the institution's own funds; instruction and so-called departmental research, the latter being that research which is not separately budgeted; and other institutional activities such as residence halls, dining halls, student hospitals, student unions, athletics, bookstores, faculty housing, chapels, theaters, public museums and other similar activities or auxiliary enterprises. Other cost centers may be needed, as in the case of off-campus projects, a medical school, etc. where the properly allocable indirect costs are substantially different.

Circular No. A-21 defines indirects costs as ''Those that have been incurred for common or joint objectives and therefore cannot be identified specifically with a particular research project, an instructional activity or any other institutional activity.'' At colleges and universities the major categories of indirect costs are: operation and maintenance expenses; building use or depreciation charges; equipment use or depreciation charges; departmental administration expenses; library expenses; research administration expenses; student administration and service costs; and general administration and general expenses.

In A-21 standards are set forth for the allocation of each category of indirect costs to the several cost centers of direct costs. In addition, 45 different types of costs are described in some detail and their allowability or unallowability either as direct costs or indirect costs are set forth.

Indirect cost rates are computed by dividing the allowable indirect costs allocated to each cost center by a base of all or some portion of the direct costs charged to that center. The base most commonly used is direct salaries and wages.

In addition to the procedure described above, Circular No. A-21 provides an abbreviated method for institutions where the total direct cost of federally sponsored research and educational service agreements does not exceed $1,000,000 in a fiscal year. Briefly the method allows fewer catagories of indirect costs but compensates to some extent by reducing the unallowable general administration and general expense. It is, as A-21 states, a ''rigid formula approach.''

Application

Indirect cost rates computed in accordance with the preceding section are subject to audit by the Federal Government. In accordance with Office of Management and Budget Circular No. A-88, a single federal agency is selected for audit of a particular institution and in practically all cases to negotiate a final indirect cost rate or rates.

Once a final rate or rates are negotiated; they can be applied to a grant or a contract in one of the following ways:

1. A provisional or billing rate can be established before a final rate is negotiated, and affected grants and contracts are retroactively adjusted after the final rate is determined. Such a procedure can create problems if the rate increases, since sponsoring agencies may be unable or unwilling to provide the additional funds needed as a result of the increased rate.

2. A predetermined fixed rate may be provided, which is normally the same as the last negotiated rate. Periods of more than one year may be covered.

3. A fixed rate may be negotiated for a particular year (or other time period) and the over-or-under recovery for that year may be included as an adjustment to the indirect costs for the next rate negotiation.

4. A negotiated lump sum for indirect costs may be negotiated for generally self-contained or off-campus activities where the applicable indirect costs cannot be readily determined. The amount must be treated as an offset to total indirect costs before the latter are apportioned to other institutional activities.

SECTION B

PRIVATE FOUNDATIONS — VOLUNTEER HEALTH AGENCIES

A discussion of the grant policies and procedures of voluntary health agencies and private foundations in a guide on federal award procedures may seem anomalous. However, since these agencies represent a source of significant research support for colleges and universities, a brief review of their policies is included as an aid to research administrators and investigators.

A chart at the conclusion of this supplement illustrates the grant award and grant administration policies of 43 different organizations. The data for this chart was drawn primarily from the responses of these organizations to a questionnaire[1] and, to the extent the questions were interpreted uniformly, the chart should be an accurate reflection of their policies and procedures.

The Tax Reform Act of 1969

A review of the development of private foundations and volunteer health agencies is not included in this supplement, nor is a review of the various federal and state laws which govern their establishment and operation. A brief review of the Tax Reform Act of 1969 is included due to the widespread concern about the act's effect upon research grants awarded to educational institutions. In this act the Congress created a subcategory of charitable institutions for tax purposes, the private foundation,[2] and subjected it to special tax provisions.

The Congressional intent was to identify and regulate those organizations which were most likely to be subjected to private interests and control, and which, therefore, had the greatest opportunity to abuse their privileged tax status as a charity. It was reasoned that organizations depending upon contributions from the general public (as opposed to private interests) for a significant portion of their annual income were less likely to be operated improperly. Therefore, the source of an organization's income became the definitional touchstone.

In order not to be classified as a private foundation, a charitable institution:

(1) must receive at least one-third of its annual support from a combination of contributions, membership fees and related activity in which it engages, excluding such income from persons affiliated with the organization; and

(2) must not receive more than one-third of its annual support from gross investment income.[3]

These income factors distinguish, for tax purposes, the public dependent charitable organization from the self-sustaining or private resource foundation. A multitude of charitable organizations obviously fall within the definition of ''private foundations.'' No matter how ''charitable'' they are, however, they are (and have been since 1969) subject to tax controls designed to discourage improper behavior.

Six basic tax provisions were designed by Congress to regulate private foundations.[4] One provision imposed a tax on net investment income for the first time. Five others imposed taxes on particular types of private foundation activity:

1. Self-dealing;
2. Failing to distribute income;

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[1] The questionnaire was sent to 55 organizations and 37 responses were received. The policies of the other six organizations included in the chart were derived from their publications.

[2] The terminology of the Internal Revenue Code has been used throughout this material. As a result, the organizations dealt with here are referred to as ''charitable organizations,'' Sec. 501, and the ''private foundations'' are a subgroup, Sec. 509, of that group.

[3] §509(a)(2) of the Internal Revenue Code is paraphrased for clarity.

[4] §§4900 through 4945, IRC.

3. Holding excess business interests;
4. Investing in a manner which jeopardizes charitable purposes;
5. Making certain types of expenditures.

Under these provisions, a tax is imposed on each occurrence of the discouraged activity and an additional tax is imposed if the foundation, after receiving notice, fails to correct its earlier action.

The ''taxable expenditures'' provision governs the purposes for which a private foundation may expend its money and establishes the conditions under which parties may validly receive its money. It is these conditions which have had a major effect on research grants. The important sections of the taxable expenditures provision are those specifying which grants to individuals and to organizations are taxable.[5] The term ''taxable expenditure'' means any amount paid or incurred by a private foundation as:

(1) a grant to an individual for travel, study, or other similar purposes by such individual unless
  (a) such grant is awarded on an objective and non-discriminatory procedure approved in advance by the Secretary or his delegate and
  (b) it is demonstrated to the satisfaction of the Secretary or his delegate that the purpose of the grant is to achieve a specific objective, produce a report or other similar product, or improve or enhance a literary, artistic, musical, scientific, teaching, or other similar capacity, skill, or talent of the grantee.

(2) a grant to an organization (with certain exceptions) unless the private foundation exercises ''expenditure responsibility,'' exerting all reasonable efforts and establishing adequate procedures:
  (a) to see that the grant is spent solely for the purposes for which made,
  (b) to obtain full and complete reports from the grantee on how the funds are spent, and
  (c) to make full and detailed reports with respect to such expenditures to the Secretary or his delegate.

These provisions appear to place significant demands on foundations making research grants. Since the final tax regulations were not published until 1973, four years after passage of the act, foundations were operating in a vacuum, and they, therefore, made a realistic decision to comply with the letter of the law. A close examination of the tax code and its clarifying final regulations now leads to the conclusion that grants to educational institutions are not subject to the restrictive provisions of the 1969 Tax Reform Act.

A summary of the procedures by which foundation grants are awarded to educational institutions illustrates this point. A research investigator may initially approach a private foundation, and if he receives encouragement, a proposal is submitted through his institution's project approval process. If the institution approves, it forwards the proposal to the foundation which may make an award to the institution under which the college or university is responsible for the project and the expenditure of the funds. Even though the initial foundation contact may be made by the individual research investigator, the grant is made to the researcher's institution. Thus the grant is not a ''taxable expenditure'' made to an individual.

The final tax regulations specifically recognize this procedure:

> A grant by a private foundation to an organization (such as a university) which the grantee organization uses to make payments to an individual for travel, study, or other similar purposes shall not be regarded as a grant by a private foundation to the individual grantee if
>
> a. The grant is made for a project which is to be undertaken under the supervision of an organization such as a university, and
>
> b. The grantee organization controls the selection of the individual grantee. This shall apply regardless of whether the name of the individual grantee was first proposed by the private foundation, but only if there is an objective manifestation of the grantee organization's control over the selection process although the selection need not be made completely independently of the private foundation.[6]

moreover, examples in the regulations which illustrate allowable practices explicitly include a description of the research grant award procedure of an educational institution.[7]

Since the normal, private research grant does not fall within the definition of ''grants to individuals'', the tax code's limitations on grants to organizations would be the only ones which would apply unless educational institutions are excepted from the rule. They are.[8] Thus, research grants to colleges and universities do not give rise to a foundation ''expenditure responsibility.''

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[5] The material which follows is a summary of Sections 4945(d)(3), (4)(g), and (h).

[6] IRC Reg. Sec. 53.4945-4(a)(4)(ii), paraphrased for clarity.

[7] IRC Reg. Sec. 53.4945-4(a)(4)(xv) Example (4).

Under the tax code, then, private foundations are free to provide research grants to educational institutions. Since the supervision of individual grantees which the law imposes on private foundations is performed by the educational institution;[9] and since the educational institution does not itself require such supervision by the foundation the freedom to make grants is complete.[10] This freedom is the same as that enjoyed by charitable institutions which do not fall within the private foundation subcategory.

Operating within the framework outlined above, private organizations providing research grants have instituted various administrative policies. Indeed, though the tax code may in many instances have led to the creation of these policies, they seem to be dictated by common sense as well. Requiring that funds only be used for the purposes of the grant and that expenditure reports be made (practices which fulfill the requirements of ''expenditure responsibility'') are simply reasonable efforts to insure that funds are used to reach the intended goal of the grant.

As the following chart illustrates, other basic policies of charitable organizations cover a wide range of procedures and activities.

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[8] Grants to organizations which are not Sec. 509 private foundations are excepted from the requirements of Sec. 4945(d)(4). Educational institutions do not fall within Sec. 509 because gifts to them qualify for charitable deductions under Sec. 170, which explicitly prevents their classification as a private foundation. Sec. 4945(d)(4) prevents the use of a multiple layer foundation system to avoid classification of grants as taxable expenditures.

[9] Sanders, Michael I., Private Foundations: Final Regulations on 4945 Clarify and Bring Order to Operating Rules, 38 Journal of Taxation 246 (1973).

[10] **The actions of private foundations and other charitable organizations are, of course, regulated by other sections of the tax code and other statutes.**

	Types of Grants			Eligibility			Application				Award			Cost Sharing Required		Pay't. Schedule	Indirect Cost Allowed		Title to Equipment			Patent Rights			No-Cost Extension On Request		If PI Transfers May Grant Be Transferred		Close-Out Requirements		
	Research	Training	Fellowships	Educational Institution	Non-Profit Organizations	Individual Faculty Members	Prescribed Application Form		Deadlines		Range of Support	Earliest Actuation Date After Award	Normal Grant Period						Sponsor	Grantee		Sponsor	Grantee	Negotiable					Fiscal	Technical	Patent
							Yes	No	Yes	No				Yes	No		Yes	No							Yes	No	Yes	No			
ABBOTT LABORATORIES	X			X	X	X		X		X	500 10K	V	V		X	N						X					X		X	X	X
AMERICAN CANCER SOCIETY	X	X	X	X		X	X		11-1 4-1		500 112K	V	V		X		25% TDC			X				X	X		X		X	X	X
AMERICAN CHEMICAL SOCIETY PETROLEUM RESEARCH FUND	X			X	X		X			X	12K M	9-1	2-3 years		X	AN	$500 DA			X					X		X		X	X	
AMERICAN DIABETES ASSOCIATION	X					X	X		3-1		3-5K		1 yr.		X	AN				X		X			X		X		X		
AMERICAN HEART ASSOCIATION	X			X			X		9-1		14K A	7-1	V		X	Q	10% TDC			X					X		X		X	X	
AMERICAN LUNG ASSOCIATION	X	X	X	X		X	X		12-1		10-25K	7-1	1-2 years		X	7-1 1-1	15% TDC					X N			X		X		X	X	X
AMERICAN NURSES' FOUNDATION	X			X	X		X		2-1 9-1		4,200 M		1 yr.		X	7-1 1-1	20% TDC		X N				X		X		X		X	X	X
AMERICAN UROLOGICAL SOCIETY		X				X	X		10-1		15K	7-1	2 yrs.			mo.		X					X		X			X		X	
ARTHRITIS FOUNDATION	X			X	X		X		9-2			V	1 yr.		X		8% TDC			X				X	X			X	X	X	
COMMONWEALTH FUND	X			X				X		X	5-100 K	1			X	AN	N			X			X		X						
COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY				X	X		X				35K A	2-5 mo.	2 yrs.						X				X		X				X	X	X
DAMON RUNYON CANCER RESEARCH FUND	X			X			X		3-15 9-15		20K A	1 mo.	1-2 yrs.		X		5% TDC			X		X			X		X		X	X	X
CANILLE AND HENRY DREYFUS FOUNDATION	X			X	X			X	4-1 9-1		10K	1 mo.	1 yr.				N									X		X	X		
EASTER SEAL RESEARCH FOUNDATION	X			X	X		X		3-1 8-1		1-10K	1 mo.	1-3 yrs.	X		AN	15% TDC			X			X		X		X		X	X	X
EPILEPSY FOUNDATION OF AMERICA	X	X	X			X	X		4-15		12K M	1-1	1 yr.		X	MO		X							X		X		X	X	
EXXON EDUCATION FOUNDATION	X	X		X			X		3-1 6-1 9-1 12-1			1 mo.	1-2 yrs.		X	SA		X	X							X			X	X	
FIGHT FOR SIGHT, INC.	X		X	X	X	X	X		3-1		3-8.5K A	V	6 mo.- 1 yr.		X			X		X			X		X				X	X	
FORD FOUNDATION	X	X	X	X	X	X		X		X			1-3 yrs.		X	Q	10-15% TDC			X			X		X		X		X	X	
ANNA FULLER FUND	X		X	X			X		1-1 3-1 6-1		10K M	1 mo.	1 yr.		X	AN				X				X	X		X		X	X	
THE GRANT FOUNDATION, INC.	X	X		X	X			LTR 1st		X		V	1-4 yrs.		X														X	X	
JOHN A HARTFORD FOUNDATION	X			X	X		LTR 1st			X	20- 172K	1-2 mo.	1-3 yrs.	X		SA	20% TDC			X				X				X	X	X	X
THE ROBERT WOOD JOHNSON FOUNDATION		X		X	X			X		X		V	V	N		AN	N			X					X				X	X	
KELLOGG FOUNDATION	X			X									X		X	N		X										X	X	X	
LALOR FOUNDATION	X			X		X			1-15		15K M		1 yr.		X	½ start ½ 6 mo.	8% TDC			X					X			X	X	X	X
JOHN AND MARY MARKLE FOUNDATION	X	X		X	X			X		X					X	Q	N			X			X		X				X	X	X
MILBANK MEMORIAL FOUNDATION	X			X	X			X			15K																				

	Types of Grants			Eligibility			Application				Award			Cost Sharing Required		Pay't. Schedule	Indirect Cost Allowed		Title to Equipment			Patent-Rights			No-Cost Extension On Request		If PI Transfers May Grant Be Transferred		Close-Out Requirements		
	Research	Training	Fellowships	Educational Institution	Non-Profit Organizations	Individual Faculty Members	Prescribed Application Form Yes	Prescribed Application Form No	Deadlines Yes	Deadlines No	Range of Support	Earliest Actuation Date After Award	Normal Grant Period	Yes	No		Yes	No	Sponsor	Grantee		Sponsor	Grantee	Negotiable	Yes	No	Yes	No	Fiscal	Technical	Patent
MILBANK MEMORIAL FOUNDATION	X			X	X			X			15K					N	N								X				X	X	
MOTT FOUNDATION				X									X	X		N		X										X	X	X	
MUSCULAR DYSTROPHY ASSOCIATION OF AMERICA	X		X			X	X		6-30 12-31		10K 20K	6 mo.	1 yr.		X		8% TDC		X						X		X		X	X	
NATIONAL DAIRY COUNCIL	X			X	X		X		4-1		10- 40K	1-1	1 yr.				10% TDC						X		X		X		X	X	
NATIONAL FOUNDATION	X			X			LTR 1st		1-1 8-1 10-1		1- 100K	I	1-2 yrs.		X	SA	10% TDC			X			X		X				X	X	
NATIONAL MULTIPLE SCLEROSIS SOCIETY	X		X	X	X		X		2-15 8-15			7-1 1-1	1-3 yrs.		X	Q	20% TDC			X		N			X		X		X	X	X
NUTRITION FOUNDATION	X			X	X	X	X		8-1 2-1		1-40 K	1-6 mo.	1-3 yrs.		X	7-1 1-1				X			X		X		X		X	X	X
JAMES PICKER FOUNDATION	X		X			X	X		9-15		4K M	2 mo.	1 yr.		X			X		X			X		X		X		X	X	
POPULATION COUNCIL	X	X	X	X	X		X		1-4 7-10/15		25K	I	1-2 yrs.				10% TDC			X		X			X				X	X	X
RESEARCH CORPORATION	X	X	X	X	X		LTR 1st			X	1-543 K	I	1 yr.	X for EQPT		AN		X		X			X		X		X		X	X	
RESEARCH FUND OF AMERICAN OTOLOGICAL SOCIETY	X			X	X	X	X		1-15		10K	7-1				Q	10% TDC			X			X		X				X	X	X
ROCKERFELLER FOUNDATION	X	X	X	X	X	X		X		X								X		X			X				X		X	X	X
RUSSELL SAGE FOUNDATION	X	X	X	X	X			X		X	1-300 K	I	1-4 yrs.		X	Q	15% TDC		X						X		X		X	X	X
SEEING EYE	X		X	X	X		X		2-15 8-15			1 mo.	1 yr.		X	12-1 6-1	15% TDC								X		X		X	X	X
ALFRED P. SLOAN FOUNDATION	X	X	X	X	X			X		X	1K to 1M	I	1-3 yrs.		X	N	15% TDC			X					X		X		X	X	X
CANCER FOUNDATION	X		X	X	X	X		X				1 mo.	3 yrs.		X	AN		X		X			X		X				X	X	X
UNITED CEREBRAL PALSY RESEARCH AND EDUCATION FOUNDATION	X	X	X	X		X	X		4-15 9-15		1300- 60K	1-1 7-1	2 mo.- 3 yrs.		X	Q	15% TDC			X					X		X		X	X	
WARNER LAMBERT ASSOCIATION	X			X				X		X	6-42K				X	N	N			X		X			X		X		X	X	X

V — Varies
N — Negotiable
A — Average
Q — Quarterly
M — Maximum
I — Immediately

AN — Annually
MO — Monthly
SA — Semi-Annual
DA — Department Allowance

SECTION C

RESEARCH PROPOSAL/CONTRACT

The Research Agreement which follows is a specimen contract for use by an educational institution when contracting with a commercial enterprise. The document serves as a proposal to the sponsor which, if funded and signed by the parties, becomes the contractual agreement.

AGREEMENT

for

SPONSORED RESEARCH

between

____

and

THE TRUSTEES OF THE UNIVERSITY OF _______________

Principal Investigator:	**Department:**
Start Date:	**Duration:**
Funds Requested:	
Corporate Name of University:	**THE TRUSTEES OF THE UNIVERSITY OF** (a _______________ non-profit corporation)
Contracting Office:	**OFFICE OF RESEARCH ADMINISTRATION**

Date:

____
Principal Investigator

APPROVED: ______________________
Dean

APPROVED: ____________________________
Vice-Provost for
Graduate Studies and Research

THIS AGREEMENT, entered into this day of between the Trustees of the University of , hereinafter called ''University,'' and with its principal office and place of business in , hereinafter called ''Sponsor.''

WITNESSETH:

The purpose of the project is to conduct a (time period) study into the

NOW, THEREFORE, it is hereby agreed as follows:

(1) The Sponsor requests University carry on such a study for a period of from the date of this agreement and University agrees to undertake such activity upon the terms and conditions hereinafter set forth.

I. **Direct Costs:**

(a) **Salaries:**
Scientific and/or technical
Clerical and administrative
(b) **Employee Benefits**
(c) **Equipment**
(d) **Current Expense**

II. **Indirect Costs:** (100% of I(a) above)
(a) University Overhead (%)
(b) Support of Basic Research (%)

(1) The Sponsor agrees to pay, monthly as incurred, the costs of the project including extra items of expense referred to herein on the basis of bills submitted by University.

(2) It is mutually agreed that should any special equipment be required for exclusive use in this research, purchase of such equipment will not be made without permission of the Sponsor. Equipment so purchased becomes the property of the Sponsor. The Sponsor further agrees to pay removal costs of such equipment as extra items of expense.

(3) University agrees that all relevant information obtained in the course of this study shall be made available to the Sponsor at any reasonable time during University regular working hours, subject to the terms of this agreement. University further agrees that it will communicate to the Sponsor information which appears pertinent to the project as it progresses.

(4) Although the Sponsor recognizes that the results of collaborative investigations must be published and be made generally available in order that the community responsibility of University be appropriately discharged, University recognizes that the specific problems solved will involve proprietary information of

the Sponsor. University may publish any results developed during this study without permission of the Sponsor providing it is not in a form revealing identity of Sponsor or his privileged input data. If the Sponsor requests, University will allow 90 days for him to review, but not alter, publications. If the Sponsor requests, University will allow one year in order that he may file appropriate application for patents.

(5) No publicity by the Sponsor is to be given to the results of the work without approval of University. All advertising or publicity matter based on the work at University is subject to the approval of the head of the department in which the work is done, the Dean of the School and the Provost or appropriate Vice President insofar as the advertising or publicity material refers to or is an interpretation of work done at the University.

(6) The name of the University is not to be used in advertising or publicity material unless authorized by the President. The names of the investigators are to be mentioned only in literature references.

(7) This contract may be terminated by either party by giving thirty (30) days written notice. In the event of termination, costs will be limited to payroll, benefits, and overhead during the thirty (30) days period following notice, plus costs committed or incurred prior thereto.

IN WITNESS WHEREOF the parties hereto have affixed their names and seals to duplicate copies hereof the day and year first above written.

ATTEST:

THE TRUSTEES OF THE
UNIVERSITY OF ____________________

____

____

(Sponsor 's Name)

ATTEST:

____

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SECTION D

CONSORTIUM AGREEMENT

On occasion an institution may be interested in performing a research project in cooperation with other institutions. NIH has issued guidelines, NIH/HEW Guide for Grants and Contracts, Vol. 2, No. 4, July 2, 1973, to be followed in establishing such cooperative relationships under an NIH Consortium Grant. The resulting contracts place the grantee institution in the position NIH would occupy if the institutions were operating independently.

The specimen contract which follows is based upon the 1973 NIH Guidelines, portions of which have been reproduced for the convenience of the user. Before drafting a similar agreement a check should be made to determine whether or not the guidelines have been amended.

CONSORTIUM AGREEMENT

NIH Guidline: **Written agreement prior to initiation of the project.** The awardee institution should formalize in writing with each cooperating institution the tentative agreement negotiated prior to receipt of the award: The agreement will specify the operational guidelines for control and direction of the research effort to ensure compliance with all pertinent federal regulations and policies and to facilitate a smoothly functioning cooperative venture. A copy of all such written agreements will be provided to the NIH awarding unit for its records.

CONTRACT

THIS CONTRACT, made this day, by and between the Trustees of the University of ______________________ (hereinafter referrred to as University), and ______________________________ Center (hereinafter referred to as Contractor).

WITNESSETH:

WHEREAS, the National Institutes of Health has awarded to the University Grant No. ______________ for support of ____, a regional interdisciplinary center for fundamental research on :

WHEREAS, the Contractor has proposed a research program in collaboration with University as detailed in the Grant Application for Grant No. ____:

WHEREAS, the Contractor has skilled personnel and facilities available to undertake such a program; and

WHEREAS, the University desires to have the Contractor conduct work in connection with this research program; and

WHEREAS, the Contractor and the University desire this agreement and the work to be performed under it to fully comply with all pertinent federal laws, regulations and policies.

NOW THEREFORE, the parties agree as follows:

ARTICLE __________: Scope of Work

The Contractor agrees to perform the work described in the Grant application for Grant No. ______________ under Section(s) __________ entitled ____________________; , . ______________________________________.
The above mentioned Grant Application dated ______________ as modified on ________________________ is hereby made a part of this subcontract.

ARTICLE________: Period of Performance

The period of performance of this contract shall begin on______________, 19___ and shall not extend beyond ______________, 19___ unless agreed to in writing by both parties hereto. It is anticipated that this program will be continued for four additional years; however, the extension of this contract beyond ______________, 19___ is subject to continuation by the National Institutes of Health Grant No. ________________ with specific funds awarded for the Contractor's portion of the work.

NIH Guideline: **Scientific Considerations** The agreement should identify the principal investigator and the responsible persons at each cooperating institution and describe their responsibilities in the project. Specific procedures for monitoring and directing the research effort should also be delineated.

ARTICLE ______: Scientific Control

The Principal Investigator of Grant No.______________ is Dr. ______________ who shall coordinate the research efforts of the various investigators under Grant No. ______________.

ARTICLE ______: Key Personnel

Dr. ______________ shall be responsible for the conduct of research by the Contractor and for administrative liaison on behalf of the Contractor under the contract. The Contractor shall not replace ______________ without prior consultation with and approval of the University.

ARTICLE ______: Inspection

Designated representatives of the University shall have the right to inspect and review the progress of the work performed pursuant to this contract. All reasonable facilities, including access to relevant data, test results and computations used or generated under this contract shall be made available when such inspections are conducted. Inspections shall be conducted in a manner as to not unduly delay the progress of the work and the University shall give the Contractor reasonable notice prior to conducting any such inspection.

NIH Guideline: **Fiscal Considerations** The agreement should cite specific procedures to be followed in reimbursing participants for their effort and should include dollar ceiling, the time schedule and method of reimbursement, the type of supporting documents required for reimbursement, and procedures for review and approval of expenditure of grant funds at each institution.

Administrative Considerations In instances where policies of cooperating institutions differ from those of the grantee institution, particularly in such areas as travel, travel reimbursement, salaries, and fringe benefits, a determination should be made and entered into the agreement as to which policies will prevail. Any such policies must not be in conflict with those of DHEW-NIH.

Direct Costs Any cost category that under NIH policy is an allowable direct cost category for the grantee institution may also be requested on behalf of the cooperating institution. The policies related to grant expenditures for research projects generally apply to consortium grants without exception.

Indirect Costs If indirect costs are requested from the grant, the indirect cost rate which has been negotiated with the DHEW by each institution under the consortium grant is the basis on which indirect costs are determined and paid under one of the two plans detailed in the guidelines.

Rebudgeting authority of cooperating institutions Rebudgeting between budget categories on the part of non-grantee cooperating institutions must have the prior approval of the grantee institution. However, the grantee institution may wish to establish in the written agreement moderate levels of rebudgeting authority within NIH policy limitations with each of the cooperating institutions.

Cost sharing A provision will be included in the written agreement covering cost sharing when it is a research grant requiring such cost sharing.

ARTICLE ______: Price, Payment and Submission of Invoices

As compensation the University agrees to reimburse the Contractor for ______________________________.
All costs incurred in the performance of this contract are subject to the limitation of Articles _____ and

______ herein. Invoices from the Contractor shall be prepared in quadruplicate and sent to ______________
____.
Payment will be made monthly for services performed in the previous month.

ARTICLE ______: Allowable Costs

The allowability of costs chargeable to this contract shall be determined by the PHS Grants Policy Statement, DHEW No. (OS) 74-50,000, July 1, 1974, the DHEW Grants Administration Manual and ________________
The Contractor's normal policies governing salaries, wages and fringe benefits shall apply to all Contractor's employees paid from this contract.

The Contractor's published policy on travel and travel reimbursement shall apply to all costs for travel and transportation charged to this contract. The total amount chargeable to this contract for alterations and renovations is $_________ which amount shall not be exceeded without prior written approval of the University. Furthermore, no funds shall be obligated for alterations and renovations until approval of the National Heart and Lung Institute has been received by the University. Patient care costs are not to be charged to this contract without prior written approval of the University.

NOTE: The Guidelines contain special restrictions on alteration and renovation costs and matters to be dealt with where patient care costs are to be charged to the grant funds.

ARTICLE ______: Indirect Cost

The estimated indirect costs of the Contractor are included in the contract amount stated in Article ______ and shall not exceed $_________ based on a predetermined fixed rate of ______% of salaries and wages.

ARTICLE ______: Rebudgeting of Funds

It is understood that the Contractor's budget as approved in the Notice of Grant Awarded for Grant No. ______________ is an estimate and that there may be a need to depart from it to meet certain unanticipated requirements of the research project. The Contractor is authorized to rebudget funds which do not require prior approval in accordance with NIH, Guide for Grant and Contract, Vol. 1, No. 22, December 15, 1972. In addition, the Contractor is also authorized to rebudget funds for the following purposes provided such is approved by Dr. ______________ and that prior approval is granted for each rebudgeting action by the Contractor's designated official for its own NIH Grants:

A. Domestic Travel in any budget period in excess of $500 or 125% of the amount for domestic travel in the approved budget, whichever is greater;

B. Individual items of research equipment $1,000 or more;

C. Total expenditure for equipment in any budget period in excess of $1,000 or 125% of the amount of equipment in the approved budget, whichever is greater.

ARTICLE ______: Cost Sharing

The Contractor shall contribute to this project in an amount not less than ______% of the total cost of this contract. If Contractor has an Institutional Cost Sharing Agreement with HEW which requires an overall contribution to HEW supported projects of ______% or above, the Contractor's responsibilities under this clause shall be deemed to be fulfilled. If Contractor does not have an Institutional Cost Sharing Agreement requiring a contribution of at least ______%, it shall provide documentation satisfactory to the University to establish its contribution to this project in at least the foregoing amount.

NIH Guideline: **Audit** All costs incurred in the consortium grant will be subject to audit by the cognizant federal audit agency, and the written agreement should incorporate as a minimum all the requirements that would be called for in the agreement between NIH and the grantee. the grantee should establish controls to see that the cooperating institution's performance, in terms of cost effectiveness, is monitored.

ARTICLE ______: Accounts, Audit and Records

(a) The Contractor shall maintain books, records, documents, and other evidence, accounting procedures, and practices, sufficient to reflect properly all direct and indirect costs of whatever nature he claims to have been incurred for the performance of this contract. The foregoing constitutes ''records'' for the purposes of this clause.

(b) The Contractor's facility(ies), or such part thereof as may be engaged in the performance of this contract, and his records shall be subject at all reasonable times to inspection and audit by the University's Contracting Officer or his authorized representatives and the cognizant federal audit agency.

(c) The Contractor shall preserve and make available his records until the expiration of 5 years after the end of the budget period which they cover or until audit is completed and all resulting questions are resolved, whichever occurs first.

NIH Guideline: **Grant-related income** The written agreement between the grantee institution and the cooperating institutions will include a clause providing for the coverage of grant-related income in accordance with the policy which requires the grantee to be accountable for the NIH's share of any such income. The grantee is responsible for the records on the receipt and disposition of such income. The cooperating institution will maintain such records as are necessary for the grantee institution to fulfill its responsibility.

ARTICLE ______: Contract Related Income

The Contractor is required to maintain such records as may be necessary to comply with the requirements of NIH Grants Policy Guide No. 2, June 19, 1970 Disposition of NIH Grant Related Income. Any such income generated under this contract shall be used to reduce the expenditures chargeable to the contract.

NIH Guideline: **Equipment accountability and disposition** The grantee institution shall have the responsibility for the purchase, inventory, accountability, and disposition of equipment in accordance with NIH policy. Title to equipment will reside with the grantee institution.

ARTICLE ______: Equipment Accountability and Disposition

All equipment purchased by the Contractor will be titled in the name of the University. At the end of the project period of grant ______________ or at the expiration of this contract, whichever occurs first, the Contractor shall provide the University with a complete inventory of all equipment purchased, including the location and the condition of each item. Upon relief of accountability for the equipment by the National Institutes of Health, the University will consult with the Contractor to determine disposition of the equipment. Should the Contractor's Principal Investigator, named in Article ______ above, move to another institution and the work supported by this contract is continued at the new institution, the Contractor agrees to the transfer of all equipment purchased with contract funds to the new institution.

NIH Guideline: **Assurances Required by DHEW-NIH** The grantee institution has the specific responsibility for all required assurances. To make sure of responsiveness on the part of the cooperating institutions, the grantee institution should incorporate an understanding concerning the assurances as a part of the formal written agreement. Any assurance normally required of the grantee institution for the program in question is also required of the cooperating institutions.

ARTICLE ______: Care of Laboratory Animals

A. Before undertaking performance of any contract involving experimentation using laboratory animals, the Contractor shall register with the Secretary of Agriculture of the United States in accordance with Section 6 of the Laboratory Animal Welfare Act of 1966, Pub. L 89-544, as amended by the Animal Welfare Act of 1970, Pub. L. 91-579 (7 U.S.C. 2131 et. seq.). The Contractor shall furnish evidence of such registration to ________
____.

B. The Contractor shall acquire animals to be used in research under this contract from dealers licensed by the Secretary of Agriculture, or from sources exempted in accordance with the Public Laws enumerated in (A) above. Provided, however, that the requirement for obtaining animals from licensed dealers shall not apply to those animals excluded from the regulations cited in (C) below.

C. In the care of any experimental warmblooded animal used or intended for use in the performance of this contract, the Contractor shall comply with: The Public Laws enumerated in (A) above; regulations issued thereunder (Title 9, Code of Federal Regulations, Parts 1, 2, and 3, entitled ''Laboratory Animal Welfare''); the principles enunciated in the ''Guide for Laboratory Animal Facilities and Care'' prepared by the Institute of Laboratory Animal Resources, National Academy of Sciences — National Research Council (Public Health Service Publication No. 1024), and the terms of this contract. In the event that any conflict among the standards prescribed by the foregoing is not clearly resolved by the express terms of this contract, the higher standard shall be used.

ARTICLE______: Protection of Human Subjects

A. The Contractor agrees that the right and welfare of human subjects will be protected in accordance with policies established by Chapter 1-40 Protection of Human Subjects, HEW Grants Administration Manual. The Contractor further agrees to provide certification to the University at least annually that an appropriate institutional committee has reviewed and approved the procedures which involve human subjects.

B. The Contractor shall bear full responsibility for the proper and safe performance of all work and services involving the use of human subjects under this contract. No provision of this contract shall be deemed to constitute the Contractor or any agent or employee of the Contractor as an agent or employee of the University. The Contractor agrees that it has entered into this contract and will discharge its obligations, duties, and undertakings and the work pursuant thereto whether requiring professional judgment or otherwise as an independent Contractor and without liability on the part of the University.

ARTICLE _____: Equal Opportunity

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and the employees are treated during employment, without regard to their race, color, religion, sex or national origin.

(b) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, Title VI of the Civil Rights Act of 1964, and the rules, regulations, and relevant orders of the Secretary of Labor.

(c) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated or suspended, in whole or in part, as deemed appropriate by the University.

ARTICLE_____: Patents & Inventions

The Contractor hereby agrees to report fully to the University any invention conceived or first actually reduced to practice in performance of this contract (hereinafter referred to as ''such invention(s)'') and shall assign all right, title, and interest in and to such invention to the University and to the Government or their designee provided, however, that it is further agreed that non-exclusive royalty free licenses to make and to use such inventions in the United States shall be granted to the Contractor. In addition, the Contractor agrees to furnish the following materials, disclosures and reports:

a) Information in writing, as soon as practicable, concerning the date and identity of public use, sale or publication of such invention known to the Contractor or of any contemplated publication by the Contractor.

b) Upon request, such duly executed instrument (prepared by the University and the Government or its designee) and such other papers as are deemed necessary to vest in the University or its designee the rights granted under this clause and to enable the University and the Government or its designee to apply for and prosecute any patent application, in any country, covering such invention.

c) Interim reports on the first anniversary of the contract where extended or renewed and every year thereafter listing all such inventions made during the period whether or not previously reported or certifying that no inventions were conceived or first actually reduced to practice during the applicable period.

d) Prior to final settlement of this contract, a final report listing all such inventions including all those previously listed in interim reports, or certifying that there were no such reported inventions.

For purpose of interpreting the foregoing provisions, the term ''invention'' is defined as including any art, machine, manufacture, design or composition of matter, or any new and useful improvement thereof, which is or may be patentable under the Patent Laws of the United States.

ARTICLE _____: Student Unrest Provision

The prohibition against expenditure of funds provided by NIH in Section 407, Title IV of P.L. 93-192, as it applies to the funds provided under Grant No. ____________ is hereby incorporated in this contract:

No part of the funds provided shall be used to compensate any person who, after fair notice and opportunity for hearing, is found to have engaged in conduct on or after August 1, 1969, which involved the use of or assistance to others in the use of force or the threat of force or the seizure of property under the control of an institution of higher education, to require or prevent the availability of certain curriculum, or to prevent the faculty, administrative officials, or students in such institution from engaging in their duties or pursuing their studies at such institution.

NIH Guidline: **Reporting Requirements** In the written agreement it should be spelled out that the cooperating institutions are responsible for making full and complete reports on anything requiring reporting to the grantee institution which will in turn make the required reports to the NIH. The progress report should be patterned to show specific parts of the project separately and to report progress separately by the investigators responsible for the various portions of the project.

ARTICLE ______: Reports
The Contractor shall render such reports as required by the Principal Investigator including an annual report which shall be included in the progress report of the continuation application for Grant No. ________________.

NIH Guideline: **Publications** The cooperating institutions must decide in advance whether the principal investigator at the grantee institution alone receives credit on research reports and other publications or whether the actual investigator at one of the cooperating institutions will receive such credit. Regardless of the arrangement, general agreements regarding authorships should be established initially.

ARTICLE ______: Publications
All research reports and other publications relating to the work under this contract shall:

(1) Bear proper acknowledgement of the support provided by Grant No. ______________, and

(2) Indicate authorship in accordance with the following agreement:

ARTICLE ______: Subcontracts

It is understood that the Contractor shall not subcontract any of the research effort required under Article ______ above, without prior written approval of the University.

ARTICLE ______: Termination

If at any time NIH Grant No. ______________ is terminated by NIH, this contract shall also be terminated upon receipt by the Contractor of Written Notice to that effect from the University. The Contractor shall be reimbursed for uncancellable obligations properly incurred prior to the date of notice of termination.

IN WITNESS WHEREOF, the parties have caused this contract to be executed as of the date first written above by their duly authorized representatives.

SECTION E

SUBCONTRACT

This specimen subcontract was developed for use by an educational institution when contracting with a commercial enterprise or educational institution for the conduct of work covered by a Government grant or contract to the institution. It should be modified as necessary to comply with the institution's research policy and the requirements of the research project.

Subcontract No.

THE UNIVERSITY OF

SUBCONTRACT UNDER

DEPARTMENT OF

PRIME CONTRACT No.

SUBCONTRACTOR:

ADDRESS:

CONTRACT FOR:

CONTRACT PERIOD: through

ESTIMATED COST: $

TOTAL AMOUNT ALLOTED: $

ISSUED BY:

Subcontract No.

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ATTACHMENTS:
- EXHIBIT A. WORK STATEMENT
- EXHIBIT B. BUDGET
- EXHIBIT C. COPY OF PRIME CONTRACT No.

Subcontract No.

PREAMBLE

This Contract, entered into on
by and between The University of
(hereinafter called the University, an institution of higher learning) and

(hereinafter called the ''Contractor''),

and constituting a subcontract under Prime Contract No.
between the University and the Government; which Prime Contract
provides for

WITNESSETH THAT:

The Contractor agrees to furnish and deliver the supplies and perform the services set forth in this contract for the consideration stated herein.

Subcontract No.

SCHEDULE

ARTICLE 1. STATEMENT OF WORK

(a) The Contractor shall provide the necessary personnel, equipment, facilities and supplies to perform the services specified in the attached Work Statement marked Exhibit A, which by this reference is made a part hereof.

(b) The University will provide a project director for the program, who will advise the Contractor in performance of the required services.

Subcontract No.

ARTICLE 2. DELIVERY OR PERFORMANCE SCHEDULE

The Contractor shall furnish and deliver the supplies and perform the Services required by Article 1, Statement of Work, in accordance with the following schedule:

The period of performance under this Contract is specified as
through , for which period funds are available and allotted.

Subcontract No.

ARTICLE 3. ALLOWABLE COSTS AND PAYMENT

(a) **Estimated Cost**

The estimated cost of performance of this Contract is $ ____________________.

(b) **Budget**

A budget which is agreed to by the parties to this contract is hereby attached as Exhibit B and made part of this contract for all purposes.

[Provision for amendment may be made if desired]

(c) **Allowable Costs**

For the purpose of determining the amounts payable to the Contractor under this contract, the allowability of costs shall be determined in accordance with (i) [here reference ASPR, FPR, or regulations of the agency concerned], and (ii) the terms of this contract; provided, however, that in determining the allowability of costs, the advance understandings, if any, on particular items of cost set forth below shall be given effect. In the event of any inconsistency between such advance understandings and the cost principles referred to in (i) above, the advance understandings shall prevail.

(1) **Direct Costs**

(2) **Indirect Costs (Overhead)**

(A) The periods for which final negotiated overhead rates shall be established pursuant to this contract are as follows:

It is agreed that the rate established for this period is ______% of ______.

It is agreed that the rate for further periods will be established by subsequent negotiation and incorporated into this contract by amendment.

(3) **Payment**

(A) The Contractor shall, at approximately thirty (30) day intervals following commencement of work, submit billings, in the form hereinafter described, to the University for payment of costs incurred during the preceding calendar month.

(B) Payments for performance under this contract shall be made by the University to Contractor on a cost reimbursable basis when billed. Any payments so made shall be in accordance with the aproved budget referred to above and attached as Exhibit B.

Subcontract No.

ARTICLE 4. SPECIAL PROVISIONS

(a) The books of account, files, and other records of Contractor which are applicable to this contract shall at all times be available for inspection, review, and audit by the University and its representatives to determine the proper application and use of all funds paid to or for the account or benefit of Contractor; in addition, Contractor shall provide such special reports as requested by the University to permit evaluation of progress of the project.

(b) This contract may not be assigned in whole or in part without the prior consent of the University.

(c) this contract may be terminated by either party upon thirty days' written notice to the other party.

(d) Title to equipment purchased by the Contractor pursuant to the terms of this contract shall remain in the University, and equipment shall be returned to the University upon the termination of this agreement, unless other disposition is mutually agreed upon and permitted under terms of the Prime Contract.

(e) Contractor hereby agrees to indemnify and hold harmless the University from any and all claims or liability that may arise out of or on account of any failure on the part of Contractor to perform any service or duty as herein agreed.

(f) Contractor assumes sole responsibility for reimbursement to the granting or funding agency a sum of money equivalent to the amount of any expenditures disallowed should the granting or funding agency or an authorized agency rule through audit exception or some other appropriate means, that expenditures from funds allocated to the Contractor for direct and/or indirect costs were not made in compliance with the regulations of the granting or funding agency or the provisions of this contract.

(g) This contract shall commence on the day of and shall terminate on Such contract may be renewed upon such terms as the parties may agree.

Subcontract No.

ARTICLE 5. INCORPORATION OF APPLICABLE PROVISIONS OF PRIME CONTRACT

(a) All applicable provisions contained in the Prime Contract between the University and the Government, numbered except as hereinafter listed, shall be binding upon the Contractor, and Contractor hereby agrees to comply with same. A copy of the Prime Contract is attached to this subcontract as Exhibit C and made a part hereof for all purposes.

(b) The following provisions in the Prime Contract will not be applicable to this subcontract:

Subcontract No.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

The University of

By ______________________________

____

____
Contractor

By ______________________________

____
(typed Name)

____
(Title)

Instructions to Contractor:
If a corporation, affix corporate seal.

SECTION F

SPECIMEN CONTRACT CLAUSES

The specimen clauses in this section were selected in part for their conciseness and, if they do not completely fulfill the requirements of the research project, should be rephrased as appropriate for the situation. Also, if a proposed contract requires greater elaboration or precision it is suggested that an ASPR or FPR clause, modified as necessary, be used in the contract.

APPENDIX III — SPECIMEN CONTRACT CLAUSES

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IDENTIFICATION OF PARTIES

This SUBCONTRACT, effective as of ____________, by and between the Trustees of the University of ____________ (hereinafter referred to as the University) and the (Name of Subcontractor) (address) (hereinafter referred to as Subcontractor).

This contract is entered into as of ____________, 197__, by and between ____________ a corporation organized and existing under the laws of the State of ____________, hereinafter called ____________, and the Trustees of the University of ____________, a non-profit Educational Institution organized and existing under the laws of the State of ____________, hereinafter called the Contractor,

WITNESSETH:

or

WITNESSETH THAT:

STATEMENT OF REASON AND PURPOSE CLAUSES

1.

Whereas, the United States Department of ________ ________ has awarded to (NAME OF UNIVERSITY) a contract for a study to ____, and

2.

Whereas, the National Science Foundation has agreed with the University, that a portion of Grant No. ________ will be allocated for research on ____________________, the purpose of which is to investigate ____________________.

3.

Whereas, ____________ has proposed to assist the University in the accomplishment of the preceding by supporting the University performance of contract No. ________, and

4.

Whereas, the Subcontractor has proposed a program to collaborate in the research on a Cost Plus Fixed Fee basis with the University in accordance with the University's application for research contract dated ____________________, 197____.

5.

Whereas, it is in the best interest of the University to obtain the assistance of the Subcontractor for the performance of the work and/or services set forth in the following paragraphs, and,

6.

Whereas, it is a condition of the Grant that Grantee and Subcontractor enter into this Agreement, and,

7.

Whereas, the Subcontractor is specifically qualified and equipped to perform the work and/or services described in a manner contemplated herein, and

8.

Whereas, the Contractor has skilled personnel and facilities available to undertake such a program, and

9.

Whereas, the University desires to have the Contractor conduct work in connection with the research project.

10.

NOW THEREFORE,

11.

NOW, THEREFORE, the parties agree as follows:

12.

NOW, THEREFORE, in consideration of the premises and intending to be legally bound hereby, the parties hereby agree as follows:

STATEMENT OF SCOPE OF WORK

1.

Contractor shall, as an independent Contractor and not as an agent of the University, perform a study of the ''______________________________.'' Details of the study are set forth in exhibit ''A'' to this contract, entitled ''Statement of Work,'' dated _______________.

2.

The Contractor agrees to use its best efforts to perform the work set forth in the Statement of Work appended hereto as Appendix ''A'' and made a part hereof. The scope of work shall not be changed except by duly executed amendment to this contract.

3.

The Contractor agrees to perform the work set forth by Tasks I through IV in the scope of work appended hereto as Appendix ''A'' and made a part hereof.

4.

The Contractor hereby grants the University an option to increase the amount of work to be performed under this contract to include Tasks V and VI of the scope of work (Appendix A) for the amount specified in Article _____.

CHANGES

1.

Changes In Work

A. No changes in the scope, complexity or character of the work under this contract shall be made by or authorized for Subcontractors by the Contractor without prior written approval of the University.

B. The University may require changes by written notice in the scope, complexity or character of the contract work after the work has commenced. Adjustments in compensation to the Contractor and in performance schedules, as required by such changes, shall be determined by negotiation between the University and Contractor.

2.

Changes

1. University shall have the right to make changes within the scope of work of this contract and Contractor shall proceed with the work as changed, but no additional charge will be allowed unless authorized in writing by this University. If such changes affect delivery, cost or any other contract term, Contractor shall notify University immediately and a reasonable adjustment shall be negotiated.

PERIOD OF PERFORMANCE

1.

The period of performance for this subcontract shall begin on ______________ and shall terminate on ________________ unless extended by mutual agreement of the parties in writing.

2.

The period of performance of this contract shall be for a period of twelve months, beginning ________________, unless extended by mutual agreement in writing between the parties, or unless terminated by the University as provided by Article ___.

3.

The term of this subcontract is three years, beginning __________ and ending __________, unless extended by mutual agreement in writing between the parties. This subcontract may be terminated before ________ by either party hereto upon written notification delivered to the other party at least thirty (30) days prior to the date of the early termination. University shall not commence performance of either the second or third year until this subcontract is formally amended in writing authorizing such performance.

4.

The period of performance for the completion of the work described in ARTICLE ___, Scope of Work, is _____________ months beginning _____________ and continuing through _____________, with delivery of the various phases to University not later than the dates indicated below:

Event

Event	**Date**
Completion of Phase I,	________________
Completion of Phase II,	________________
Completion of Phase III,	________________

If the Subcontractor becomes unable to complete the subcontract work and to deliver at the times specified above because of technical difficulties, notwithstanding the exercise of good faith and diligent efforts in performance of the work, he shall give (University) written notice of the anticipated delays with reasons therefor not less than forty-five (45) days before the delivery date specified. When notice is so required, (University), in its discretion, may extend the time specified above for such period as it deems advisable.

5.

The period of performance of this contract shall be for a period of four (4) months beginning ________________, ____.

6.

Work under this contract shall start on _______________ and shall, subject to the provisions of the clause entitled ''Termination'' of the General Provisions hereof, be completed on or before __________.

PRICE AND PAYMENT

1.

Article___: PRICE, PAYMENT, AND SUBMISSION OF INVOICES

As compensation for the performance of this contract, the University agrees to pay the Contractor the fixed price of ______________________. Invoices from the Contractor shall be prepared in triplicate and sent to ____. Payment will be made monthly for services performed in the previous month.

2.

Article___: PRICE AND PAYMENT

As compensation for the performance of this contract, the University agrees to pay the Contractor costs not to exceed (________). The University will be invoiced by the Contractor on a monthly basis for costs incurred.

3.

ARTICLE ___: CONSIDERATION

It is estimated that the total cost to University, including all direct and indirect costs for the performance of work under this subcontract during the first year shall not exceed ($________), which costs are detailed in Exhibit ___ and will be reimbursed in accordance with the following:

1. **Direct Costs.**

The Subcontractor will be reimbursed all necessary and required costs, described below and detailed in Exhibit ___, incurred directly and specifically in the performance of this subcontract, which are claimed by required by this subcontract, provided such costs are consistent with the Subcontractor's policy and

- a. Salaries and wages, including fringe benefits, of employees directly engaged in performing the work required by this subcontract, provided such costs are consistent with the subcontractor's policy and practice approved by his cognizant Government audit agency.
- b. Materials and services required in the performance of this subcontract, after deducting all discounts for the purchase of such materials and services.
- c. Such other costs not expressly excluded by other provisions of this subcontract, as should, in the opinion of University, be included in the cost of the work called for by this subcontract. Approval of such costs will be identified as being allowable under this subparagraph.

2. **Prior Authorization Required of Certain Direct Costs.**

Prior written approval of University is required for incurrence of the costs listed below. Without approval, incurrence of such costs by the Subcontractor with the intent of claiming reimbursement as direct costs under this subcontract will be at the Subcontractor's own expense.

- a. Any second tier subcontract which is (1) on a cost-plus-fixed-fee basis or (2) is on a fixed-price basis exceeding five (5) percent of the total estimated cost of this subcontract, or (3) any purchase order or subcontract exceeding $1,000.00 for any articles, supplies, equipment or services necessary to the performance of this subcontract.
- b. Any fee or other payment for consultation.
- c. Overtime shift, or other incentive premium.
- d. Any rental agreement or service contract.
- e. Purchase of any item of office equipment regardless of cost.

3. **Indirect Costs.**

- a. The allowable indirect costs under this subcontract will be established in accordance with the procedure set forth in Clause ___ of the General Provisions entitled ''Negotiated Overhead Rates''.
- b. Beginning on the effective date of this subcontract and continuing until the subcontract is amended

indirect costs will be reimbursed to the Subcontractor at the provisional rate of ____% of the total Direct Cost chargeable to this subcontract.

The Subcontractor will submit vouchers or invoices once each month on costs incurred, as appropriate, to the following address:

____

____

____

____

4.

Article ___: CONTRACT COST

The estimated cost of performing the studies set forth in Article ___ is ______________ for the first year; ______________ for the second year, and ______________ for the third year for a total estimated cost of ______________. The funds initially obligated to this contract are ______________ and Contractor agrees not to exceed the foregoing amount unless and until additional funds are obligated by formal written amendment to this contract. The foregoing estimated cost does not provide for performance of additional tasks which Contractor may be requested to undertake. If such additional work is requested and performed the contract price will be adjusted to provide for the cost of such extra work.

5.

Article ___: PRICE, PAYMENT, AND SUBMISSION OF INVOICES

As compensation for the performance of this contract, the University agrees to pay the Contractor the fixed price of ________________________________($). Invoices from the Contractor, shall be submitted to ____

____

not more frequently than once each month for work performed the previous month. The invoices shall include the number of hours worked on this contract for the Project Director and other key personnel.

6.

Article ___: PROJECT BUDGET

Subcontractor shall not exceed the project budget attached hereto as "Appendix ___". Transfers between budget categories shall be governed by the rules for NIH Grants as stated in ____. Transfers between budget categories other than those allowed above must receive prior approval of the Grantee, and where required by NIH.

7.

Article ___: INDIRECT COST RATE

The Indirect Cost rate for this contract shall be ____% of Salaries and Wages and this shall be considered a Final rate. The Subcontractor agrees to submit to Grantee a copy of its most recent Negotiation Agreement with the Government.

8.

Article ___: ANTICIPATORY COSTS

Allowable costs under this contract shall include the costs incurred by Contractor in connection with the work covered by this contract during the period from and including ________________ to the date of this contract which would have been allowable pursuant to the terms of this contract if this contract had been in effect during said period; provided, however, that such costs shall not in the aggregate exceed ($) which amount is included in the estimated cost of this contract.

9.

Article___: PUBLICATION COSTS

No payment shall be made for any work performed by the Subcontractor after the expiration date, except that payment may be made to reimburse publication costs incurred after the expiration date provided, however, that such reimbursable publication costs shall not exceed the total budgeted for this purpose, plus overhead if appropriate, and provided further that such publication costs and overhead do not cause the total amount authorized under this subcontract to be exceeded.

10.

Article ___: FOREIGN TRAVEL COSTS

Foreign travel costs are allowable only when the travel has received specific prior written approval from ________________________________ of the University. Each separate foreign trip must be specifically approved. For purposes of this provision, foreign travel is defined as any travel outside of Canada and the United States and its territories and possessions.

REPORTS

1.

Article ___:

The Contractor shall render reports to the Principal Investigator herein named, as set forth in Article ___. (Or as set forth in Appendix ___.) Forty (40) copies of each report shall be furnished to University with one copy directly to (Sponsor).

2.

Article ___:

The Subcontractor will submit to the University the following technical reports:

a. Quarterly Report
b. Annual Report
c. Final Report within 90 days of subcontract termination
d. Reprints of Publications
e. Special Reports as requested

Actual date of submission, quantity and format will be as specified by (Principal Investigator).

3.

Article ___:

A. A Monthly Status Report, Exhibit ___, will be attached to each voucher submitted for payment — a narrative report relating progress to expenditures. The reports also will describe any difficulties encountered in the performance of the work which may affect both cost and delivery schedule.

B. One copy of each Monthly Status Report shall be sent to each of the following:

____
____
____

4.

Article ___:

Within 90 days of the end of the period of performance cited in ____ above, Subcontractor shall deliver to University a Final Invoice detailing all costs for the contract period in such form as outlined in Appendix ____ attached hereto.

INSPECTION

1.

Article ___:

Designated representatives of the University shall have the right to inspect and review the progress of the work performed pursuant to this contract. All reasonable facilities, including access to relevant design data, test results and computations used or generated under this contract shall be made available when such inspections are conducted. All such inspections shall be conducted in a manner as to not unduly delay the progress of work. In addition the University shall give the Contractor reasonable notice prior to conducting any such inspection (24 hours minimum). Inspection by the University shall not relieve the Contractor of his responsibility to fully and formally report the details of the work as set forth herein.

2.

Article ___:

The following, or a similar provision, may be added to the above clause when appropriate:

Inspection of the Contractor's progress by the National Science Foundation may be arranged for from time to time by the University. The Contractor shall not make any direct arrangements with the National Science Foundation for review of the work to be performed pursuant to this contract.

3.

Article ___:

All contract services shall be subject to acceptance by representatives of the Government or University. For this purpose, the Contractor shall allow at all reasonable times University or Government representatives free access to the operations and shall furnish such reasonable facilities, supplies and assistance for the safety and convenience of University or Government representatives in the performance of their duties.

TECHNICAL ASSISTANCE/TECHNICAL CONTROL

1.

Article ___: TECHNICAL ASSISTANCE

The University and the Project Director shall receive technical assistance throughout the contract performance period herein set forth, from (Name of Contractor's Representative). It is therefore understood and agreed that Contractor's representative shall be allowed access to design data, test results and computations as may be required to insure compliance with the terms of this contract. Contractor's personnel are acting in an advisory capacity only, and are not authorized to furnish any technical guidance or instructions to the University.

2.

Article ___: TECHNICAL DIRECTION

It is understood by the parties hereto that final scientific supervision and program control of the work specified to be performed pursuant to this contract shall be vested in the University. The Principal Investigator shall be Dr. _______________ or his duly appointed successor.

3.

Article ___: SCIENTIFIC CONTROL AND KEY PERSONNEL

The Principal Investigator for contract _______________ is Dr. __________________ who shall be responsible for overall direction of the work to be performed under this subcontract. The project director for the Subcontractors work described in Article ___ above shall be Dr. ________________ who shall not be replaced as project director for this subcontract without prior written approval of the University.

4.

Article ___: COORDINATION

Contractor shall coordinate its performance of the work set forth in Article _____ with Professor __________________, the Research Coordinator assigned by University.

LEVEL OF EFFORT

Article ______:

The level of effort to be expended by the Contractor in the performance of work under Items ______ and ______ of Appendix ______ shall be a total of ______ man-hours of direct labor for the first year of the program. It is understood and agreed that the Contractor's total legal obligation for the performance of work for the first year of the program shall be fulfilled when the Contractor has expended the total of ______ man-hours of direct labor, of which a minimum of ______ percent shall be senior staff engineering hours.

Level of effort requirements for the second year of the program will be established and added to the contract by amendment prior to the commencement of work in that year.

KEY PERSONNEL

1.

Article ______:

The Contractor will assign Dr. ______________ as Associate Principal Investigator and Dr. ______________ as Project Director for the work to be performed on this contract and shall not replace them without the prior written approval of the Principal Investigator and the University.

2.

Article ______:

A. The following-named individuals are key personnel in the performance of this contract:

Name	**Title**
Dr. ______________	Principal Investigator
Dr. ______________	Co-Principal Investigator
Dr. ______________	Co-Principal Investigator

It is expected that each of the named individuals will devote a minimum of ______ of his time in each of the two years in the preparation of the ______________________. A different apportionment of the times of Dr. ______________ and Dr. ______________ is permitted, provided their combined time apportionments represent as a minimum ______% of their time for each of the two years.

B. In the event the Subcontractor elects to replace any of the above-named individuals, a resume of the qualifications of the proposed replacement will be forwarded to ______________ for its approval prior to making a charge against this subcontract for such services.

Article ______: KEY PERSONNEL

The Key Personnel identified below has been determined to be necessary for the successful performance of the work under this subcontract. In the event the assigned individual leaves the subcontracting institution or is reassigned to another program, the Subcontractor shall notify the Contractor in writing reasonably in advance and include a proposed substitute of substantially equal ability and qualifications. No diversion or replacement shall be made by the Subcontractor without the written consent of the Contractor.

Personnel	**Title**

PUBLICATIONS

1.

Article ______:

University shall have the right to publish any information, conclusions or developments resulting from its research under this Agreement, provided, however, that ________ shall be provided with a copy of such intended publication within a reasonable time prior to the submission of such information to the Publisher. ________ shall have the right within a reasonable time after its receipt to suggest reasonable alterations or deletions, or request that any reference to ________ and its component parts be deleted from the publication. ________ shall have the right at any time to publish the results of University's research under this Agreement.

2.

Article ______:

The right of publication of this investigation rests with the University. The subject matter of any publication shall not contain proprietary information about the processes or methods of the Sponsor and no rights therein shall accrue to the University as a result of this investigation. Publication shall be confined to a statement of new medical discoveries and interpretations of scientific fact. In the event of publication, the Sponsor will be acknowledged unless it desires otherwise and so advises the University in writing.

3.

Article ____: INFORMATION

University and its employees hereunder shall be free to make information concerning all results and knowledge gained in connection with the research performed hereunder freely available to the industrial, academic and other segments of the public

It is hereby understood that information exchanged between the parties concerning the research performed hereunder will not be of a confidential nature, nor will it establish a confidential relationship of any kind.

4.

Article ____: ACKNOWLEDGEMENT

The Subcontractor agrees to include an appropriate acknowledgement of the ________________________ support in publications based on work aided by this subcontract.

EQUAL OPPORTUNITY

1.

Article ____:

During the performance of this contract, the Contractor agrees to comply with all provisions of Executive Order 11246, dated September 24, 1965, as amended and of the rules, regulations, and relevant orders of the Secretary of Labor on Equal Employment Opportunity created thereby.

TERMINATION

1.

Article ____:

This Agreement may be terminated by either party hereto by giving written notice to the other party 90 days in advance of a specified date of termination. In case of termination by the Sponsor, the University shall be reimbursed for all commitments made under the terms of this Agreement prior to such termination.

2.

Article ____:

This contract shall terminate as provided by Article ____ hereof unless the University, in its sole discretion, shall elect to terminate this contract earlier by giving notice in writing to the Contractor at

____

Such notice shall be effective on receipt by the Contractor. In the event the University does terminate this contract pursuant to this Article ____, it shall pay to the Contractor, in addition to Contractor's invoices then outstanding, all costs and expenses incurred prior to receipt of such notice, plus the costs of effecting the termination, and a reasonable profit on all such costs and expenses.

3.

Article ____:

In the event of default by the Contractor of its obligations under this contract, or in the event that ____(Sponsor)______ terminates work by the University on the subject matter of this contract, then performance by the Contractor under this contract may be terminated by the University at any time by giving written notice to the Contractor at least 30 days prior to the date of termination. Should performance be so terminated, the Contractor shall be reimbursed for his reasonable costs and commitments to date of termination, along with the appropriate portion of the Contractor's profit or fee thereon, but only to the extent that such costs and commitments are reimbursable to the University under the terms of the aforementioned grant from __________(Sponsor)__. Payment shall be made upon submission to the University of a voucher covering the aforementioned performance and submission of any and all results achieved to the time of termination and acceptance thereof by Mr.________________or his duly appointed successor.

4.

Article ____:

The University or the Contractor may advance the termination date of this subcontract by giving the other sixty (60) days notice in writing that the contract shall terminate at a specified earlier date. Upon receipt of such notice from the University, the Contractor shall take necessary action to cancel outstanding purchase orders and other commitments relating to the work under this contract, and shall exercise reasonable diligence to cancel or redirect commitments for personal services to its activities and operations. In the event the University terminates the contract in accordance with this paragraph, the Contractor shall submit a termination statement to the University, in the form and with the certification prescribed by the Contract Officer, and an equitable settlement shall be made. The settlement shall include payment to the Contractor for costs incurred or, if applicable, reimbursement to the University along with submission of any and all results achieved up to the time of termination.

EQUIPMENT

1.

Article ____:

The University will furnish the Contractor the research equipment listed in Appendix ___ appended hereto and made a part hereof. The Contractor warrants that he will maintain, protect, and preserve the property in accordance with the standards established in Appendix ___ of the Armed Services Procurement Regulation and that upon completion of the contract will return the property to the University in the same condition as received, normal wear and tear excepted. It is agreed, however, that the Contractor will not be responsible for loss or damage to the property except that caused by his gross negligence or willful misconduct. The University will supply the Contractor identification tags to be affixed to each item of research equipment.

TITLE OF PROPERTY

1.

Article ____: GOVERNMENT PROPERTY

Title to all property furnished by the Government or acquired under this subcontract shall remain in the Government. Disposition of such property at the completion of this subcontract shall be as directed by the Government.

2.

Article ___: TITLE IN PROPERTY

1. Title to equipment with an acquisition cost of less than $1,000 each and purchased with funds available for this subcontract shall vest in the Subcontractor upon acquisition or as soon thereafter as possible.

2. Title to each item of equipment with an acquisition cost of $1,000 or more shall vest in the Government and disposition shall be as directed by the Government.

STANDARD OF WORK

1.

Article ___:

The Contractor agrees that the performance of work and services pursuant to the requirements of this contract shall conform to high professional standards.

2.

Article ___:

Contractor agrees that its performance of work and services required by this contract shall conform to high professional standards. All work under this contract shall be performed under the general guidance and direction of Dr. ____________________. Contractor shall be responsible for the qualifications of faculty, research fellows, graduate students or Research Specialists who may be employed on this research project.

RIGHTS IN DATA

1.

Article ___:

The term ''Subject Data'' as used herein includes writing, sound recordings, pictorial reproduction, drawings or other graphical representations, and works of any similar nature (whether or not copyrighted) which are specified to be delivered under this contract. The term does not include financial reports, cost analyses and similar information incidental to contract administration. Subject to the following proviso the Contractor, as required, may duplicate, use, and disclose in any manner and for any purpose whatsoever, and have others to do so, all Subject Data delivered under this contract provided however, the Contractor shall not disclose or permit any disclosure of Subject Data to others by printed publication without first (1) advising the University of each such disclosure, and (2) ascertaining through patent counsel for the University that such disclosure(s) will not adversely affect the application for patents contemplated by Article______. The Contractor agrees to and does hereby grant to the University as required a royalty-free, non-exclusive, and irrevocable license throughout the world to publish, translate, reproduce, deliver, perform, dispose of and to authorize others so to do, all Subject Data now or hereafter covered by copyright.

2.

Article ___: REPRODUCTION OF DATA FOR ___________

The Contractor agrees to and does hereby grant to University the right to reproduce, use and dispose of all or any part of the reports, drawings, blueprints, data and technical information specified to be delivered to University pursuant to this contract, and the Contractor agrees to hold harmless University and its assigns from any liability arising out of said reproduction, use or disposition. University shall give Contractor prompt notice in writing of any suit or action alleging such liability.

3.

Article ___: PROPRIETARY DATA

It is understood and agreed that proprietary information of University (whether or not patentable) of any nature whatsoever disclosed to the CONTRACTOR by University as a result of this contract, shall not in any way or manner be disclosed by the CONTRACTOR to any person, business firm or organization.

PATENTS

1.

Article ___:

The Contractor hereby agrees to report fully to the University any invention which is or may be patentable, first conceived or first actually reduced to practice in performance of this contract (hereinafter referred to as ''such invention(s)'' and shall assign all right, title and interest in and to such invention to the University provided, however, the University agrees to grant to Contractor an exclusive license to make, use, and sell such inventions in the United States and throughout the world as set forth in Appendix ___ which is appended hereto and made a part hereof. In addition, the Contractor agrees to furnish the following materials, disclosures and reports:

a) Information in writing, as soon as practical, concerning the date and identity of any public use, sale or publication of such invention known to the Contractor or of any contemplated publication by the Contractor.

b) Upon request, such duly executed instrument (prepared by the University) and such other papers as are deemed necessary to vest in the University the rights granted under this clause and to enable the University to apply for and prosecute any patent application, in any country, covering such invention.

c) Interim reports on the first anniversary of the contract where extended or renewed and every year thereafter listing all such inventions made during the period whether or not previously reported or certifying that no inventions were conceived or first actually reduced to practice during the applicable period.

d) Prior to final settlement of this contract, a final report listing all such inventions including all those previously listed in interim reports, or certifying that there were no such reported inventions.

For purposes of interpreting the foregoing provisions, the term ''invention'' is defined as including any art, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, which is or may be patentable under the Patent Laws of the United States.

2.

Article ___:

Whenever any invention, which is or may be patentable, is conceived or first actually reduced to practice in the course of or under this contract, the Contractor shall furnish the University with complete information thereon; and agrees for itself and for its employees that it will execute all documents and do all things necessary or proper to enable the University to meet its obligations to the U.S. Government under National Science Foundation Grant No. ________. The Contractor specifically agrees that the National Science Foundation shall have the right to determine whether or not and where a patent application shall be filed, and to determine the disposition of the invention and title to and rights under any application or patent that may result, and that the Foundation may arrange in any case to have the invention described in a printed publication. It is understood by the parties that notwithstanding any such determination, the National Science Foundation has agreed by the terms of Grant No. ________ to grant the Contractor a non-exclusive, royalty-free, irrevocable license for the practice of any such invention throughout the world.

In addition, the Contractor agrees to furnish prior to final settlement of this contract, a final report listing all such inventions or certifying that there were no such reported inventions.

For the purposes of interpreting the foregoing provisions, the term ''invention'' is defined as including any art, machine, manufacture, design, or composition of any matter, or any new and useful improvement thereof, which is or may be patentable under the Patent Laws of the United States.

3.

Article ___:

Any invention conceived or made under this Agreement solely by Mr. ______________ shall be the University's property except as otherwise provided herein, subject to an irrevocable, royalty-free, unrestricted worldwide license which is hereby granted Contractor, including the right of Contractor to license its subsidiaries and such subsidiaries to so license their subsidiaries. In addition, ________________ shall have the right to license third parties without accounting.

Joint inventions made by Mr. ______________ and one or more employees of ________ shall be jointly owned and title to all patents issued thereon shall be joint, and each party shall have the unrestricted right to license third parties thereunder without accounting. With respect to any joint inventions, where one party elects not to file a patent application thereon in any particular country (including the United States) or not to share equally in the expenses thereof, the other party shall have the right to file such application at its own expense and shall have full control over the prosecution and maintenance thereof.

SUBCONTRACTS

1.

Article ___:

The Contractor agrees that no subcontract for research, development or design work provided hereunder will be executed without prior written aproval of the University, and further, that such subcontract shall include all applicable provisions of this contract. Professional consulting services rendered to the Contractor are excluded from the definition of the term ''subcontracts'' for the purposes of this Article.

(Alternative)

Article ___:

Professional consulting services rendered to the Contractor are excluded from the definition of the term ''subcontracts'' for the purposes of this Article, if the aggregate payments under this contract to any such consultant or organization do not exceed $2,000.

(NOTE: The above limitation may be substituted for the last sentence in foregoing clause if it is desired to limit amount to be spent for consulting services.)

SUBCONTRACT APPROVAL

1.

Article ____:

This subcontract shall be subject to the Approval of the Contracting Officer of University's Prime Contract No. ________ or his duly authorized representative.

GENERAL PROVISIONS (INCORPORATION)

1.

Article ____:

The attached General Provisions, ________, as amended, are attached hereto and made a part hereof with the following modifications:

2.

Article ____:

The General Provisions (Cost Reimbursement Contracts with Commercial Institutions) are attached hereto and are incorporated into this subcontract by reference with the same force and effect as though set forth herein in full. As used in the aforesaid General Provisions as modified and supplemented, the term ''Contracting Officer'' and ''Government'' shall mean either the University or the Government Contracting Officer who has cognizance over the University's prime contract as may be applicable and determined by the University. Copies of all notices or reports required to be furnished shall be furnished to the University.

LIABILITY — INSURANCE

1.

Article ____:

CONTRACTOR agrees to indemnify and save UNIVERSITY harmless from all damages and liability arising out of, or in connection with, the presence of the CONTRACTOR on UNIVERSITY'S premises pursuant to this contract, provided, however, that such damage and liability shall not have been caused by the negligence of agents or employees of UNIVERSITY.

2.

Article ____:

It is hereby agreed that:

(a) The Contractor shall be solely responsible for any and all third party liability incurred by it in connection with the performance of this contract.

(b) The Contractor shall maintain the following insurance:

(1) Workmen's Compensation and Employer's Liability to meet statutory liability limits in the state wherein the work is to be performed.

(2) Comprehensive General Liability, bodily injury and property damage which shall include automobile liability.

(3) such other insurance which ________ may require from time to time as will furnish reasonable protection against claims which may arise from operations under this contract whether such operations be by the Contractor or others whose services are engaged by the Contractor or anyone directly or indirectly employed by either of them.

The liability limits of all insurance required here, except Workmen's Compensation and Employer's Liability, shall be not less than $________ bodily injury, and one accident of occurrence, $________ bodily injury aggregate and $________ property damage, any one accident or occurrence.

(c) Certification of insurance evidencing that the requirements of paragraph (b) have been met shall be furnished to University before work is commenced with respect to performance under this contract. The insurance requirement pursuant to the provisions of this clause shall be in such form and for such periods of time as University may require or approve, and with insurers approved by University. Provisions shall be made for ten days advance written notice by mail to University of change in or cancellation of such insurance.

(d) In the event the Contractor fails to furnish such certificates prior to the commencing of work or to continue to maintain such insurance during the performance of the contract, University shall have the right to withhold any payments or partial payments required to be made under this contract; and shall have the right to continue withholding any or all of said payments so long as the Contractor has not complied with the requirements of this clause.

INSPECTION OF RECORDS

1.

Article ____:

(a) The Contractor agrees that its books and records and its plants, or such part thereof as may be engaged in the performance of this contract shall at all reasonable times be subject to inspection and audit by any authorized representative of the Government and or University.

(b) The Contractor shall cause a like provision to be included in all subcontracts hereunder.

2.

Article ____:

(a) The Contractor agrees that University or the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment under the University's contract with ______________, have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor involving transactions related to this contract.

(b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the Subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration date of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such Subcontractor involving transactions related to the subcontract. The term ''subcontract'' as used in this clause excludes (1) purchase orders not exceeding $________ and (2) subcontracts or purchase orders for public utility services or rates established for uniform applicability to the general public.

(c) The provisions of paragraphs (a) and (b) above are in addition to any other provisions of this contract relating to access to, retention or inspection of records.

APPLICABLE LAW

1.

Article ____:

This Agreement constitutes the entire agreement between the parties relative to the subject matter, and may only be modified or amended by a written agreement signed by both parties. It shall be construed in accordance with the laws of the State of ____.

2.

Article ____:

Insofar as this subcontract is not governed by federal law and the regulations required thereby, or incorporated herein by reference, this subcontract shall be construed and interpreted solely in accordance with the laws of the State of _____________________________________.

3.

Article ____:

Mr. _________________ will be expected to comply with all applicable University rules, procedures, and practices in effect at the Research Center during his assignment.

PUBLICITY

Article ____:

No advertising or publicity mentioning the University shall be used by the Contractor without written approval from the University.

SUPPLIES

1.

Article ____: FURNISHING OF MATERIALS OR SUPPLIES BY UNIVERSITY AT ITS OPTION

University may at its option from time to time furnish the Contractor with materials or supplies not obtainable in the open market and which are required by the Contractor for the performance of this contract. In such event, an equitable reduction in the contract price shall be made prior to the delivery of such materials or supplies to the Contractor, or as soon thereafter as possible, but in no event later than thirty (30) days after such delivery.

2.

Article ____: RESPONSIBILITY FOR SUPPLIES

Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection; and (ii) the Contractor shall bear all risks as to rejected supplies after notice of rejection.

HUMAN SUBJECTS

1.

Article ____: PROHIBITION OF USE

Notwithstanding any other provision contained in this subcontract, or incorporated by reference herein, the Subcontractor is expressly forbidden to use human subjects in any manner whatsoever. The Contractor agrees not to use, or employ, any human subjects for research, experimentation, tests or other treatment under the scope of work as set out in this contract.

2.

Article ____: PROTECTION OF HUMAN SUBJECTS

(a) The Contractor agrees that the right and welfare of human subjects will be protected in accordance with policies established by Chapter 1-40 Protection of Human Subjects, HEW Grants Administration Manual. The Contractor further agrees to provide certification to the University at least annually that an appropriate institutional committee has reviewed and approved the procedures which involve human subjects.

(b) The Contractor shall bear full responsibility for the proper and safe performance of all work and services involving the use of human subjects under this contract. No provision of this contract shall be deemed to constitute the Contractor or any agent or employee of the Contractor as an agent or employee of the University. The Contractor agrees that it has entered into this contract and will discharge its obligations, duties, and undertakings and the work pursuant thereto whether requiring professional judgement or otherwise as an independent Contractor and without liability on the part of the University.

CARE OF LABORATORY ANIMALS

Article ____:

(a) Before undertaking performance of any portion of this contract involving experimentation using laboratory animals, the Contractor shall register with the Secretary of Agriculture of the United States in accordance with Section 6 of the Laboratory Animal Welfare Act of 1966, Pub. L. 89-544, as amended by the Animal Welfare Act of 1970, Pub. L. 91-579 (7 U.S.C. 2131 et. seq.). The Contractor shall furnish evidence of such registration to ____

____

(b) The Contractor shall acquire animals to be used in research under this contract from dealers licensed by the Secretary of Agriculture, or from sources exempted in accordance with the Public Laws enumerated in (a) above. Provided, however, that the requirement for obtaining animals from licensed dealers shall not apply to those animals excluded from the regulations cited in (c) below.

(c) In the care of any experimental warmblooded animal used or intended for use in the performance of this contract, the Contractor shall comply with: the Public Laws enumerated in (a) above; regulations issued thereunder (Title 9, Code of Federal Regulations, Parts 1, 2, and 3, entitled ''Laboratory Animal Welfare''); the principles enunciated in the ''Guide for Laboratory Animal Facilities and Care'' prepared by the Institute of Laboratory Animal Resources, National Academy of Science — National Research Council (Public Health Service Publication No. 1024), and the terms of this contract. In the event that any conflict among the standards prescribed by the foregoing is not clearly resolved by the express terms of this contract, the higher standard shall be used.

ASSIGNMENTS

Article ___:

Any assignment of this contract or rights thereunder shall be void unless made in accordance with the provisions of this clause. Any monies due or to become due hereunder may be assigned, but no such assignment shall be binding upon University until two (2) copies of the assignment have been received and acknowledged in writing by ____________________________.

GLOSSARY

INTRODUCTION

The definitions contained in this glossary were taken principally from Government publications dealing with contracts and grants. In some instances they have been abridged or modified to make them applicable to more than the originating agency.

Allowable Cost — The term used to describe a cost for which an institution may be reimbursed under a research support agreement with the Federal Government. The determination of allowability for educational institutions is governed by cost principles published as Federal Management Circular FMC 73-8 and as ASPR 15.3, FPR 1-15.3.

Authorized Institutional Representative — The administrative official who is empowered to commit the proposing organization to the conduct of a research project and who thereafter is to represent the institution in dealing with the supporting agency on all administrative matters concerning the project.

Basic Agreement (BA) — A written instrument of understanding effective for a specific period between a Contractor and agency setting forth the negotiated contract clauses which will be applicable to anticipated future contracts within the scope of the agreement. Existence of a basic agreement does not create a legal implication or obligation that the Government will in fact enter into any contract (s).

Business Officer/Fiscal Officer — The financial official of the Grantee institution who has primary responsibility for the accountability for and reporting on grant or contract funds.

Change Order — This is a written order signed by the Contracting Officer, directing the Contractor to make changes which the Changes clause of the contract authorizes the Contracting Officer to order without the consent of the Contractor.

Contract — An exchange of promises which gives rise to legally enforceable rights and duties. Contracts with the Federal Government are subject to an extensive body of law and regulation which governs, among other subjects, the manner of contract formation, terms and conditions, and remedies and sanctions available to the parties.

TYPES OF CONTRACTS

(1) **AEC Special Research Support Agreements** — These are agreements which contain nearly all the standard contract boilerplate. They function very much like fixed price contracts, except that unexpended funds must be returned or be credited to the next contract extension.

(2) **A Cost-Plus-a-Fee-Contract** — This is a cost-reimbursement contract under which the Contractor is paid a fee as well as for experienced costs. The fee may be set as a fixed percentage of the total estimated cost (a cost-plus-fixed-fee contract) or it may vary depending upon specified parameters such as cost, performance or schedule incentives set at the time the contract is negotiated (a cost-plus-incentive-fee-contract). Colleges and universities are rarely eligible for cost-plus-a-fee-contracts.

(3) **A Cost Reimbursement Contract** — This is a contract issued on the basis of an estimate of the costs of performing the work arrived at by negotiation between the Government and the Contractor. The contract provides for payment to the Contractor for costs actually incurred up to a ceiling amount equal to the total estimated cost stated in the contract. The Contractor is excused from further performance after his costs reach the ceiling, unless the Government increases the ceiling.

(4) **A Fixed Price Contract** — This is a contract in which the Contractor guarantees to deliver or to perform the contract work within the period specified at a fixed price agreed upon in advance and payable no matter what the actual costs are.

(5) **A Fixed Price Contract with Price Revision** — This is a Fixed Price Contract which contains a provision for negotiating the price, sometimes both downward and upward within preset limits, after the work has been completed.

(6) **Letter Contract** — A letter contract is a written preliminary contractual instrument which authorizes immediate commencement of performance and stipulates a date by which a complete contract must be entered into. This form of contract is authorized when it is not possible to negotiate a definitive contract in time to meet the procurement need.

Contract Administrative Office [CAO] — The office which performs assigned functions relating to contract administration and assigned pre-award functions.

Contracting Officer [CO] — An agency official who is, by virtue of his position or express appointment under prescribed procedures, authorized to develop, enter into and administer contracts, and to make determinations and findings with respect thereto.

Contracting Officer's Representative [COR] — An agency employee designated in writing by a Contracting

Officer pursuant to agency regulation to act as the Contracting Officer's authorized representative in administering a specific contract. The Contractor is furnished a copy of the appointment which will delineate the scope of the COR's authority.

Cost Sharing — This is a requirement that a performing institution not receive reimbursement for all its allowable costs under a sponsored project. It usually is given effect through a negotiated agreement, included or incorporated in the support instrument, under which the institution agrees not to seek reimbursement for specified cost items up to a specified ceiling.

Data — The term used to describe recorded information, regardless of form or characteristics.

Flowdown — The term used to describe the requirement that a contract clause appearing in a prime contract appear in subcontracts. The requirement may apply to first tier subcontracts (Contractor-Subcontractor) or to all tiers (Subcontractor-Subcontractor as well). The requirement may be triggered by certain characteristics of the subcontract which are specified in the clause or regulations, e.g. subcontracts for a value of more than $10,000.

Formal Advertising — This procurement method derives its name from the procedures it employs. There are several steps in a formally advertised procurement: (1) preparation of the Invitation for Bids (IFB) which clearly, accurately, and completely describes the Government's requirements, (2) distribution of the IFB to prospective bidders by mail, posting in public places, and other means as may be appropriate, (3) submission of bids by prospective Contractors, (4) public opening and recording of bids, and (5) award of a contract to that responsible bidder whose bid will be most advantageous to the Government. The contract awarded will be of the firm fixed-price type under normal circumstances.

General Provisions — These provisions are often referred to as ''boilerplate'', because for the most part they are contract clauses required by statute or regulation to appear in all Government contracts or all contracts of a particular type. [NOTE: Though the provisions used by different agencies may have the same title and appear similar, significant aspects of the clause may be different and one should not assume the clause is the same as that with which one is familiar.]

Grant — An exchange of property or funds for assurances that a particular use will or will not be made of it. The assurances required may be extensive and detailed, taking the form of conditions to which the grantee agrees. Insofar as a breach of any of these conditions is subject to remedy at law the grant constitutes a contract.

TYPES OF GRANTS

(1) **Consortium Grant** — This is a grant made to one institution in support of a project in which the program is carried out through a cooperative arrangement between or among the grantee institution and one or more participating institutions. The cooperative agreement is subject to approval by the grantor and should be negotiated prior to submission of the proposal.

(2) **Demonstration Grant** — This is a grant, generally of limited duration, made to establish or demonstrate the feasibility of a theory or approach.

(3) **A Formula Grant** — This type of grant is awarded on the basis of some formula for distribution prescribed by legislature or executive direction. Prime examples are formula grants to agriculture experiment stations. The scope of work is very broad.

(4) **A Grant-Contract** — A term used by some Government agencies to refer to an agreement which while ostensibly a grant contains many provisions normally found in research contracts.

(5) **A Grant-in-Aid** — This is another name for a project grant or formula grant, most frequently the latter.

(6) **An Institutional Grant** — This type of grant is awarded generally on some type of formula basis which takes into consideration the volume of grants and contracts in one or more fields or disciplines at an institution. Detailed proposals are not normally required. The National Science Foundation and the Department of Health, Education and Welfare are the primary sources of institutional grants. The scope of work is very broad.

(7) **The Project Grant** — This is the most common form of grant. It provides funding for a specific project or program with a reasonably clearly defined scope of work.

(8) **The Step-Funded Grant** — This is a project grant usually for a period of three years, with the initial grant providing 100% of the funds for the first year, ⅔ of the funds for the second year and ⅓ for the third year. A year later, if the project is to be continued, the grant provides ⅓ of the funds for the second year, ⅓ for the third year and ⅓ for a fourth year.

Grantee — The institution, public or private nonprofit corporation, organization, agency or other legally accountable entity that receives a grant, and assumes legal and financial responsibility and accountability both for the awarded funds and for the performance of the grant-supported activity.

Grants Manager/Grants Management Officer — The agency official responsible for grant administration and for liaison with grantees. (He is responsible for all business management aspects associated with negotiation, award, and administration of grants.)

Grants Officer — The agency official authorized to take final action on grants.

Indirect Costs — These are costs that have been incurred for common or joint objectives and therefore cannot be identified specifically with a particular project or activity. They are costs involving activities carried out for mixed purposes, e.g. library system, or which benefit a variety of activities, e.g. building maintenance.

Indirect Cost Rate — A percentage rate negotiated by a Contractor, normally with the federal agency most involved with research by the Contractor, which when applied to a base of the research project's direct costs, determines the maximum reimbursable indirect costs of the project. A single indirect cost rate is usually negotiated for use on all federally funded projects at an institution.

Key Personnel — The personnel, considered to be of primary importance to the successful conduct of a research project. The term usually applies to the senior member(s) of the project staff. Those coming within the definition are normally identified by name in the research agreement.

NASA Cooperative Agreements — These agreements generally involve no exchange of funds but involve the use of NASA services, equipment or facilities.

Negotiate, Negotiation — These terms, when applied to the making of contracts, refer to making purchases and contracts without formal advertising.

Prime Contract — Any contract entered into directly between the Contractor and the Government or other party which is not for the purpose of carrying out any requirement of another contract.

Prior Approval — The requirement for written documentation of permission to use project funds for purposes not in the approved budget, or to change aspects of the program from those originally planned and approved. (Prior approval must be obtained before the performance of the act which requires such approval under the terms of the agreement.) The permission must be signed by the Grants Officer if a grant or by the Contracting Officer if a contract.

Program Director/Project Director/Principal Investigator — The faculty member or other employee of the educational institution whose proposed project is approved and funded by the awarding agency and who is responsible for the scientific conduct of the project.

Program Officer/Program Manager — The title given by grantor agencies, especially NSF, to the scientific or technical employee responsible for evaluation of proposals and recommendation of action thereon in a specific area and, if an award is made, for the scientific aspects of grant administration and for liaison with Principal Investigators/Project Directors.

Senior Personnel — Those professorial or professional personnel who are either (1) responsible for the scientific or technical direction of a supported project as named Principal Investigators or Project Directors, or (2) senior assistant to the PI/PD.

Special Provisions — These are the tailor-made requirements of an agreement, e.g. scope of work, price, delivery terms, and additional matter related to the particular contract requirements.

Subcontract — Any contract entered into which relates to the performance of another (prime) contract. A contract for materials or equipment for use in performance of another contract, or for the performance of a task or in preparation for a task required to be performed by another contract is a subcontract of that contract.

Technical Data — The term used to describe recorded information, regardless of form or characteristic, of a scientific or technical nature.

Technical Officer — A Government representative designated to coordinate technical matters arising under the contract. He will deal directly with the research investigator and may make decisions within the scope of the contract. As a rule he cannot make any decision regarding administration or cost matters which remain the province of the Grants manager or the Contracting Officer. A written change order should be requested whenever the technical officer requests an action which has an effect on the scope of work or which increases costs.

Unsolicited Proposal — The term applied to a written offer to perform work which is not the result of a formal written request for proposals issued by an agency. The offer may be less elaborate than a response to an invitation, but it should contain the same elements.

USDA Cooperative Research Agreements — These reflect significant technical collaboration between a grantee experiment station and an agency laboratory.

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